MORRISON'S MINING RIGHTS

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MINING RIGHTS

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PUBLIC DOMAIN

15TH EDITION
ENLARGED AND REVISED TO DATE

LODE AND PLACER CLAIMS, TUNNELS, MILL SITES AND WATER RIGHTS, STATUTES AND DECISIONS, FORMS AND PROCEDURE ON PATENT APPLICATIONS

FOR PROSPECTORS, ATTORNEYS, SURVEYORS AND MINING COMPANIES

BY R. E. MORRISON AND EMILIO D. DE SOTO
OF THE SACRAMENTO BAR

BANCROFT-WHITNEY CO.
SAN FRANCISCO
1911

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PREFACE

This work has passed through fourteen editions without a Preface, and if our own preference were followed we would allow the present edition to speak for itself without the formality of an introduction.

The First Edition appeared in 1874, shortly after the passage of the now so well known congressional act of 1872, still substantially in force. Its endeavor was to counsel how to conform to the terms of that act which introduced a multitude of questions now advanced to the form of reported cases. To follow the progress of such act and its amendments and the judicial construction of the same has been the object of each successive edition.

This act has now been so thoroughly interpreted by hundreds of adjudications that, upon most points, the mining attorney, being advised of the facts, can so counsel his clients as to avoid the necessity of a law suit, to compromise where the facts are not clear, or to attack or defend the disputed title with reasonable expectation of success.

It is to check, not to encourage, litigation that this book has been written, and especially its office has been and still is to advise the prospector at the outstart how to protect his title by conforming to our suggestions.

We only add that, among the authors in the same field, little professional jealousy seems to exist, and we cordially thank Mr. Curtis H. Lindley, author of a most thorough work on the subject; Mr. George P. Costigan, Jr., and Mr. Horace F. Clark of Washington, D. C., for courteous suggestions along the progress of this last revision.

MORRISON & DE SOTO.

DENVER, COLO., January 12, 1917.

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MINING RIGHTS

DISTRICT RULES.

Mining districts and their rules had their origin in the mining camps of California in 1849, before any territorial form of government had been established, and their system became the precedent for like organizations wherever discoveries of mineral values in other sections brought together an influx of prospectors.

Practically all the Pacific Slope and the land east of the mountains to the Missouri River was then public domain. The vast ore bodies of the Comstock, the wealth of Alder Gulch, the placers of Pikes Peak, and of countless intermediate mineral localities were all appropriated and their values extracted under the protection of this form of local self-government for many years, with no paternal interference by the National Legislature.

Each local camp called itself a Mining District as defined by the action of a mass meeting of the miners. Some of them were less than a mile square, others quite extensive, and they have become permanent geographical divisions for purpose of description in the conveyance of real estate of all kinds in the mining states.

After defining the name and local extent of the district these meetings usually designated certain officials to be elected from time to time, and then proceeded to adopt rules regulating the size of claims and the prerequisites of location and providing for annual labor or periodical representation in some form.

Before the territorial organizations were complete, and while the diggings were remote from organized society, they often took a much wider scope, and provisions were made for executive officers, for miners' courts, and covering all sorts of subjects. But these incidents have long since ceased.

Where the districts have been abandoned, provision has generally been made to preserve their records in the County Recorder's office.

With almost no interference by State or Territorial Acts they were the mining laws of the land until the Act of Congress of July 26, 1866. This but slightly limited their authority, but the Act of May 10, 1872, covered so many essential incidents, and has been so supplemented by State legislation, that they have been gradually abandoned, and survive now only as a name of description.

Even in Alaska the district organizations are but little preserved. Where not extinct their existence is practically confined to the keeping of district records for the registry of locations, with regulations defining the details of location. Undoubtedly where there is no State or Territorial Statute a district can yet be organized and the incidents of location fixed by its rules, but any attempt to revive old districts or enact new district rules in any State or Territory which has any pretense of a mining code would only tend to confusion.

These rules were not altogether arbitrary or experimental. In many respects they followed precedents already long established in Spain and Mexico. The requirements of discovery and discovery shaft, of sinking and record, periodical labor, forfeiture for non-representation, and many others, are duplicates, more or less close, of like provisions of the Royal Code of 1783, but enacted by these local conventions of practical miners in entire ignorance of the existence of such code.—Rockwell's Sp. & Mex. Laws, 25.

For instances of the form and contents of District Rules see 11th edition, p. 5.

The rules under which the Comstock lode was located are printed in *Kinney v. Cons. Va. Co.*, 10 M. R. 467, 4 Saw. 382, Fed. Cas. No. 7827.

Unorganized Districts.

A mining title may be proved without either district organization or proof of district rules.—*Golden Fleece Co. v. Cable Co.*, 1 M. R. 120, 12 Nev. 312.

Where land office or other forms contain a blank for the name of the mining district, and no district has ever been formed, it is usual to fill such blank with the word "Unorganized." And there is no doubt that a mining district may exist to the extent of giving a name to a locality and limited to that extent, and such name, when adopted by common consent, is as valid as if adopted at a district meeting.

The term "Mining District" has a well known meaning, while the term "mineral district" is only a vague and indefinite generalization.—*U. S. v. Smith*, 11 F. 487. The same as to "locality." *Foster v. Hart Co.*, 52 Colo. 429, 122 P. 54.

New Districts in Alaska.

The Alaska Act recognizes old district organizations, provides for new ones and contemplates the passage of district rules. Upon the organization of a district the minutes of first meeting should show that it was called by public notice and attended by a majority of the miners either personally or by representation; should define boundaries; elect permanent Chairman and Recorder; and after providing for keeping permanent and accessible records should adopt but few if any rules, the 1915 Territorial Act sufficiently covering all items of location and record.

Judicial Decisions as to District Rules.

Where in ejectment for a mining claim the plaintiff has described the same as located under district rules, he may recover without proof of the existence of such rules by evidence of his prior possession and the entry of defendant; but if his *prima facie* case on possession is negatived by any title proved by defendant he must then show the existence

of the district rules and his compliance therewith before he can introduce his location or record made under such rules.—*Sears v. Taylor,* 5 M. R. 318, 4 Colo. 38.

Courts will not inquire into the regularity of the mode by which district rules have been enacted, except upon allegation of fraud, or other like cause.—*Gore v. McBrayer,* 1 M. R. 645, 18 Cal. 583.

Where the evidence renders it doubtful whether the written laws of the district are in force, both the written laws and parol proof of the mining customs may be offered in evidence.—*Coleman v. Clements,* 5 M. R. 247, 23 Cal. 245.

District Records.

A district record kept in a pocket diary is no record.—*Fuller v. Harris,* 29 F. 814. A district recorder can not appoint a deputy.—*Van Buren v. McKinley,* 8 Idaho 93, 66 P. 936.

Once proved to exist are presumed to continue.—*Riborado v. Quang Pang M. Co.,* 2 Idaho 144, 6 P. 125.

The land office, in patent applications, has the power to decide what rules are in force.—*Parleys Park Co. v. Kerr,* 130 U. S. 256, 17 M. R. 201, 32 L. Ed. 906, 9 Sup. Ct. Rep. 511.

A mining regulation can not restrict the number of claims which a party may hold by purchase.—*Prosser v. Parks,* 4 M. R. 452, 18 Cal. 47.

A district rule can not limit the size of a claim duly located before such rule was adopted.—*Table Mt. Co. v. Stranahan,* 9 M. R. 465, 21 Cal. 548.

A right to hold a claim may be forfeited by failure to comply with the district rules.—*St. John v. Kidd,* 4 M. R. 454, 26 Cal. 264. But not unless the rule itself so expressly provides. —*Bell v. Bed Rock Co.,* 1 M. R. 45, 36 Cal. 214; *Emerson v. McWhirter,* 133 Cal. 510, 65 P. 1036. See *Yosemite Co. v. Emerson,* 208 U. S. 25, 52 L. Ed. 374, 28 Sup. Ct. Rep. 196.

A valid district rule may exist and be proved, although not

found among other written rules of the district.—*Harvey v. Ryan,* 4 M. R. 490, 42 Cal. 626.

A custom, reasonable in itself, and generally observed, will prevail against a written mining regulation which has fallen into disuse.—*Id.* The existence of a district mining law is a question of fact for the jury.—*Id.*

Effect of Mining Codes.

Alaska and all the Mountain and Pacific States except Utah have adopted more or less complete mining codes. In Utah a little is left to the control of the district organizations, but the inclination in all is toward statutory regulations and on whatever point the statute is made to cover the authority of the district rules ceases, except as to rights already vested. The tendency is thus to their ultimate extinction. See STATUTORY REQUIREMENTS and RECORD.

The 1909 Mining Act of California is in some respects the best legislation on the subject because of its simplicity, it requiring none of the useless and burdensome details such as are imposed by the Montana and Nevada Acts.

Its Sec. 1426 R.:

> The provisions of this Act shall not in any manner be construed as affecting or abolishing any Mining District or the rules and regulations thereof,

would seem to allow the district rules to control the statute, but for the fact that the district rules are generally either obsolete or run concurrent with the Act.

CONGRESSIONAL RECOGNITION OF MINERS' RIGHTS.

License to Appropriate the Public Domain.

R. S. Sec. 910.—No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.—*Sec. 9, A. C. Feb. 27, 1865.*

License Under Congressional Act of 1866.

Sec. 1.—The mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.—*July 26, 1866. Repealed May 10, 1872.*

License Under Present Congressional Law.

R. S. Sec. 2319.—All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.—*Sec. 1, A. C. May 10, 1872.*

Section 910 contains the first Congressional recognition of the fact that the mineral lands of the United States were being appropriated by its citizens.

From the time, however, of the discovery of gold in California, the government had tacitly recognized the occupation of its mining lands as such, and withheld them from survey and pre-emption.

Judicial Recognition.

The judiciary of California and all the States and Territories on the Pacific Slope had recognized the "Miner's Title" as property entitled to protection, and they were followed by the Supreme Court of the United States to the same effect.—*Sparrow v. Strong,* 2 M. R. 320, 3 Wall. 97, 18 L. Ed. 49; *Forbes v. Gracey,* 14 M. R. 183, 94 U. S. 762, 24 L. Ed. 313.

Consecutive Acts of 1866, 1870 and 1872.

In 1866 the first Act was passed looking to the absolute disposition of mineral veins. In 1870 a supplemental Act was passed embracing placers. In 1872 these Acts were revised and the Act of Congress of May 10 of that year, found in Chapter 6, Title 32 of the Revised Statutes of the United States, is, with slight change, the Congressional law still in force. Reprinted in U. S. Compiled Statutes of 1901, p. 1422.

LEGAL STATUS OF POSSESSORY CLAIMS.

The National Government the Source of Title.

By proper expressions in the Organic Act of each Territory and the Enabling Act of each State, the ownership of the United States in the public domain is declared as fundamental law. The attempt once made in California to assert a State ownership in mines, *Hicks v. Bell,* 3 Cal. 219, has long ago been abandoned.—*Moore v. Smaw,* 12 M. R. 429, 17 Cal. 199, 79 Am. Dec. 123. The title to all lands in the French and Mexican cessions is, in the first instance, in the United States of America, excepting grants made by the old governments prior to the treaties. These cessions include all land west of the Mississippi River except the old Territory of Oregon.

The fee simple thus remaining in the government, all citizens, or persons who have declared their intention to become citizens, are allowed to enter upon the unappropriated public

domain and acquire title to mineral lands by complying with certain regulations intended to preserve the peace and protect the first occupant.

Before the passage of Acts of Congress to this effect, the assertion of claims to mines by discoverers had been recognized by district rules, local statutes and decisions of courts. But ever since 1866 the matter has been regulated by specific Acts of Congress, supplemented by district rules and local legislation concerning the details of location and the manner of perfecting title.

Texas.

When the Republic of Texas became a State of the Union in 1845, it retained ownership of all its public lands. The mining laws of the United States therefore are not in force there.

In 1913 the State adopted a leasing system, charging 10 per cent royalty on gas, 12½ per cent on oil, 5 per cent on metals and a tonnage rental on coal.

It provides for pre-empting lode claims, 1500 by 600 feet and placer claims of 40 to 320 acres by procedure modeled on the United States Mining Law, requiring $100 annual labor. Oil and gas locations are limited to 1280 acres, and 1000 acres when within ten miles of a producing well. The many details of the Act are found in Chapter 173 of the thirty-third session and its amendments at special session of same legislature, page 26.

Whether a Vested Estate.

That a possessory mining claim is a vested estate is no longer debatable. It is "property in the highest sense of that term." Its legal status is clearly and learnedly stated by GILBERT, J., in *O'Connell v. Pinnacle Co.*, 140 F. 854, 4 L. R. A. (N. S.) 919, 72 C. C. A. 645. This opinion, as well as the decision which it affirms (131 F. 106), gives the distinc-

tion between such a mining title and a possessory pre-emption or homestead title in cases of descent before patent.

For all practical purposes the owner of a possessory title is considered as the owner in fee.—*Buchner v. Malloy,* 100 P. 687, 155 Cal. 253. But the claim is still public land within the protection of the A. C. forbidding interference with mineral surveyors.—*U. S. v. Fickett,* 205 F. 134, 123 C. C. A. 366.

The Miner Holds a Qualified Title

dependent upon possession and maintained by compliance with local directions. He is not compelled to advance to patent nor to pay for the use of the land, but his holding is of the same legal class as a homestead or pre-emption and is in anticipation of an ultimate entry and patent. His title is not absolute in a technical sense, nor secure in a practical sense, until he gets the fee simple title by such proceedings.

Abandonment.

Such an estate, dependent upon possession, is conversely one which may be lost by abandonment.—*Merritt v. Judd,* 6 M. R. 62, 14 Cal. 59; *Mallett v. Uncle Sam Co.,* 1 M. R. 18, 1 Nev. 188, 90 Am. Dec. 484.

Is a Freehold.

That is to say, an estate which passes to the heirs.—*Harris v. Equator Co.,* 12 M. R. 178, 8 F. 863; *White Star Co. v. Hultberg,* 220 Ill. 578, 77 N. E. 327; *McFeters v. Pierson,* 15 Colo. 201, 22 Am. St. Rep. 388, 24 P. 1076; *Keeler v. Trueman,* 15 Colo. 143, 25 P. 311; *Bradford v. Morrison,* 212 U. S. 389, 53 L. Ed. 564, 29 Sup. Ct. Rep. 349.

Is Real Estate.

The miner's claim or title is real estate as distinguished from chattel or personal property and is conveyed, sued for, descends, is devisable and is treated in other respects as the real property of the occupant, subject only to the paramount title

of the United States.—*Roseville Co. v. Iowa Gulch Co.*, 16 M. R. 93, 15 Colo. 29, 22 Am. St. Rep. 373, 24 P. 920; *Butte Co. v. Frank*, 21 M. R. 368, 25 Mont. 344, 65 P. 1; *Bradford v. Morrison*, 10 Ariz. 214, 86 P. 6; *Arnold v. Goldfield Co.*, 32 Nev. 447, 109 P. 718; *Wallace v. Hudson*, 170 Cal. 596, 150 P. 988; *Trinity Co. v. Beaudry*, 223 F. 739.

The Distinctions Between Mining Claims

and other classes of realty are substantially those arising out of the following incidents:

1. The title being first acquired by possession, it may be lost by acts amounting to a discontinuance of possession; that is, by abandonment.

2. Annual labor upon each claim is required by Act of Congress as a condition upon the non-performance of which the same consequences result as in the case of a technical abandonment; that is, the ground becomes open to the entry of the next occupant.

3. The formula of notice and recording, and the method of initiating title are subject to regulation by the State, Territory or Mining District, in details not covered by the Acts of Congress.

4. Special modes of assessment and collection of taxes are or have been attempted; but distinctions of this sort have generally been found impracticable.

5. There are statutes to prevent forcible dispossession of claimants, to allow of underground surveys and inspection and to regulate drainage.

6. The mode of perfecting patent in the U. S. Land Office is wholly different from that regulating entries upon agricultural lands.

Federal Decisions Control.

It may as well be here stated that in all cases where the Mining Acts of Congress are construed and there is a conflict of authority between the State and Federal Courts the de-

cisions of the Federal Courts prevail over the State decisions, and those of the U. S. Supreme Court prevail over all.—*Street v. Delta Co.*, 42 Mont. 371, 112 P. 701; *Clark Montana Co. v. Butte Co.*, 233 F. 548.

State Statutes are of no more force than district rules.—*Clark Montana Co. v. Butte Co.*, 233 F. 548.

SCHOOL CLAIMS.

More than half of all the sections of the early Colorado Statutes on the subject of mines was taken up by a persistent attempt to force a "School Claim" on each location. The whole effort was in violation of the Organic Act, was absolutely void and has long been obsolete. It was repudiated by the miners as an attempt to put the whole cost of schools on a class of men who, as a rule, were not persons with families.

By Act of 1862, claim No. 3, east or west, was to be set apart for schools; by Act of 1866, one side claim on each end of the discovery claim of 1,400 feet was to be recorded—100 feet for schools and 100 feet for disabled miners.

SOLDIERS' CLAIMS.

By Territorial Acts passed in instances during the civil war, claims belonging to soldiers were protected from forfeiture during enlistment and for a reasonable time thereafter; they were also allowed to locate and record claims by proxy; and their titles were protected from sale on execution during their absence.

During the Spanish war Congress passed an act, relieving volunteers from performance of annual labor during their term of service. It required the record of a notice stating the fact of enlistment and of "His desire to hold said claim under

this Act."—30 St. L. 651; Mining Rights 11th Ed. 16. A notice filed under this Act was considered in *Field v. Tanner*, 32 Colo. 278, 75 P. 916.

LENGTH OF LODE CLAIM LOCATED BEFORE MAY 10, 1872.

3,000-Foot Act of Congress of 1866.

Sec. 4. * * * No location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules. *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.—*July 26, 1866. Repealed May 10, 1872.*

Before the Act of Congress of 1866

the length of lode claims was regulated either by district rules or by State or Territorial legislation. It was by no means uniform. Short lengths of 100 or 200 feet, sometimes as low as 50 feet, were the limitations under the older district rules. In later years the tendency was to allow longer claims. In Colorado the statute fixed the length of a claim in 1861 at 100 feet; in 1866 at 1,400 feet. The Act of Congress of 1866 allowed 400 feet to the discoverer and a claim of 200 feet to each associate locator, not exceeding 3,000 feet on the lode under one location.

Associates and Side Claims.

It is impossible to understand the limitations on the size of claims without considering a certain custom which originated in the earliest mining camps of California and became a general practice over the western slope. With slight local modi-

fications this custom was for the discoverer to record a notice that he claimed 50, 100 or 200 feet, as the case might be, on a certain lode. On the same paper, or by a separate paper signed later, other parties would give notice of claim to No. 1 East, No. 1 West, etc., on the same lode. Not only would the associates of the discoverer make such records, but often third parties, without even going on the ground, would file on these side claims—in instances to the extent of several thousand feet on each side from the discovery claim.

Joint Records.

In other districts the discoverer and his associates would file on the discovery claim, No. 1 East, No. 1 West, No. 2 West, etc., indefinitely by a joint location certificate, not attempting to segregate the feet claimed by one from the feet claimed by the other.

Record Without Location Work.

These side claims, whether taken separately or as one joint location, were supposed to be at least staked off on the ground, but no discovery hole was required, and, in fact, in most cases, only the paper record was made and the claims seldom pursued further, unless developments on the discovery claim seemed to indicate that the side claims might be of value. Such was not the original intention of the miners, but the custom degenerated to this, and the records of thousands of such claims remain, whose owners never did any work upon, nor ever knew the exact situation of their claims.

Nominal Associates Conveying to Discoverer.

This privilege to locate side claims was soon taken advantage of by the discoverer, who procured nominal parties to record, and immediately after recording to convey their claims to him, and as soon as the Act of Congress, 1866, was passed, such became the universal practice, the custom as it already existed being altered only in this: That the claims were no

longer numbered, but were taken together as a joint location by a supposed association of fourteen persons, taking fifteen claims of 200 feet each, or 3,000 feet in all—the discoverer being allowed one additional claim. Further, after the passage of such Act, the staking of the lode into its several claims was abandoned altogether. Before the Act each locator usually recorded one specific claim, in which the other locators had no interest, nor he in theirs, but after the Act, the record almost always showed a joint location of undivided claims.

Validity of Such Nominal Records.

It is more than doubtful whether at any time, as against an adverse *bona fide* claim, such nominal side claims were by the record alone, of any validity, unless actually possessed and defined upon the ground in some manner; *Cons. Rep. Co. v. Lebanon Co.,* 15 M. R. 490, 9 Colo. 343, 12 P. 212; *Becker v. Pugh,* 15 M. R. 304, 9 Colo. 589, 13 P. 906; *Hess v. Winder,* 12 M. R. 217, 30 Cal. 349; but the practice of the Land Office is to patent such claims without inquiry, if sufficient development for patent has been done on any one of them, or on the discovery.

Length of Lode Claim at Various Dates in Colorado.

1. Prior to Nov. 7, 1861, the length of a lode claim was fixed by district rules.

2. From Nov. 7, 1861, to March 11, 1864, the length of a claim was 100 feet, but an indefinite number of claims could be based on a single discovery.

3. From March 11, 1864, to Feb. 9, 1866, 100 feet was the length of a claim, and sixteen claims of that length could be based on a single discovery.

4. From Feb. 9, 1866, to July 26, 1866, 1,400 feet was the length of a claim and the limit of a location.

5. From July 26, 1866, to Feb. 11, 1870, 200 feet was the length of a claim and 1,400 feet could be taken under one location.

6. From Feb. 11, 1870, to May 10, 1872, 200 feet was the length of a claim and 3,000 feet could be taken under one location.

7. Since May 10, 1872, 1,500 feet is the length of a claim.

LENGTH OF LODE CLAIM SINCE MAY 10, 1872.

Not to Exceed 1,500 Feet.

R. S. Sec. 2320.—Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; * * * —*Sec. 2, May 10, 1872.*

Since May 10, 1872, 1,500 Feet

has been the well-known limit of a lode. This number of feet constitutes one undivided claim, or one lode as the word is commonly used—that is, so much of a vein as is covered by one location based upon a single discovery—and in practice so much of one vein as is known by a single name and covered by a single record. The length of 1,500 feet is the uniform length wherever the mining acts are in force. A State Statute could not shorten this length in opposition to the positive permission of the Act of Congress above printed. It is the length almost invariably expressed in the location certificate and is rarely shortened except where only a fraction of clear ground remains to be taken up.

Length—How Distributed.

This length, by common usage, is taken 750 feet on each side of center of discovery; but it may be taken all on one side except enough to include the discovery shaft itself, or it

may be distributed in any desired proportion from the center of the discovery shaft.

Location of Excessive Length.

The import of the decisions on this point seems to be that an inadvertent over-stepping of the legal length or width will not avoid the claim; *Richmond Co. v. Rose,* 114 U. S. 576, 29 L. Ed. 273, 5 Sup. Ct. Rep. 1055; *Burke v. McDonald,* 2 Ida. 679, 17 M. R. 325, 33 P. 49; *Hanson v. Fletcher,* 10 Utah 266, 37 P. 480; *McElligott v. Krogh,* 151 Cal. 126, 90 P. 823; but that the claim as to the excess is void; *Hauswirth v. Butcher,* 4 Mont. 299, 1 P. 714; *Gohres v. Illinois Co.,* 40 Or. 516, 67 P. 666; *McPherson v. Julius,* 17 S. Dak. 98, 95 N. W. 428.

A gross excess, made without excuse or evidently to take up more ground than allowed, makes the location void.—*Leggatt v. Stewart,* 15 M. R. 358, 5 Mont. 107, 2 P. 320; *Nicholls v. Lewis Co.,* 18 Ida. 224, 28 L. R. A. (N. S.) 1029, 109 P. 846.

The excess is open to location.—*Flynn Co. v. Murphy,* 18 Ida. 266, 138 Am. St. Rep. 201, 109 P. 851; *Swanson v. Koeninger,* 25 Ida. 361, 137 P. 891.

An excess staking in length or width does not invalidate, except as to the excess, when made without fraud (in this case by stepping the lines) and the mistake has been corrected before the rights of third parties attached.—*Stem-Winder Co. v. Emma Co.,* 2 Ida. (456) 421, 21 P. 1040. The amended record was allowed to relate back in *Gobert v. Butterfield,* 23 Cal. App. 1, 136 P. 516.

The locator may draw in his end line and so abandon the excess; and an excess of 150 feet is not evidence of fraud.—*Cardoner v. Stanley Co.,* 193 F. 517.

But where the excess was such that the end stakes could not be found on search within several hundred feet the location is not valid.—*Ledoux v. Forester,* 94 F. 600. And where there was a gross excess both in length and width in connection with a trifling attempt to mark the boundaries, the location was held void.—*Madeira v. Sonoma etc. Co.,* 20 Cal. App. 719, 130 P. 175.

WIDTH OF LODE CLAIM LOCATED BEFORE MAY 10, 1872.

Indefinite Under A. C. 1866.

Sec. 4.—No location hereafter made shall exceed two hundred feet * * * together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules.—*July 26, 1866. Repealed May 10, 1872.*

At the time of the passage of this A. C. allowing "reasonable quantity of surface" for convenient working, the width was fixed by District Rule at very generally 50 feet, sometimes more and even less.

A Colorado Act of February 9, 1866, allowing parallel veins, spurs and feeders within 25 feet from the center of the discovery lode to belong to the claim was construed as fixing the width at 50 feet.—*Parleys Park Co. v. Kerr,* 17 M. R. 201, 130 U. S. 256, 32 L. Ed. 906, 9 Sup. Ct. Rep. 511.

Prior to the Act of Congress of 1872, the width of claims had been considered merely as a question of sufficient surface for convenient working.

WIDTH OF LODE CLAIM SINCE MAY 10, 1872.

Limits Allowed by Present U. S. Law.

R. S. Sec. 2320. * * * No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other.—*Sec. 2, May 10, 1872.*

Present Width Fixed by Colorado Statute.

R. S. Sec. 4193. The width of lode claims hereafter located in Gilpin, Clear Creek, Boulder and Summit counties, shall be one hundred and fifty feet on each side of the center of the vein or crevice; in all other counties the width of the same shall be three hundred feet on each side of the center of the vein or crevice; and the owner or owners of any lode claim or claims heretofore located and having a less width, desirous of securing the benefit of this act may file an additional certificate claiming such additional width as herein provided; provided, That hereafter any county may, at any general election, determine upon a greater width not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at said election, and any county by such vote at such election may determine upon a less width than above specified. *Act of May 14, 1913, Stats. p. 413.*

By Act of 1874, passed to conform to the A. C. of 1872, the legislature conceded the narrow width of 150 feet to the same four counties mentioned in the above printed Act of 1913 and allowed 300 feet to the rest of the state. This remained the law until 1911 when the uniform width of 300 feet was adopted and in 1913 the width throughout the state was increased to 600 feet except in the four counties originally limited to the narrower width. The proviso about submitting change of width to local election is mere surplusage.

All the Other States and Alaska

allow the full limit of 600 feet width, except North Dakota, which fixes the width at 300 feet, allowing counties to increase or decrease it within the Congressional limit.

Center of Vein, Center of Claim.

It will be observed that the center of the lode is made the center of this width. If, therefore, a party attempt to locate more than half the extreme width on either side of his vein, the location of such excess is without authority of law, although the entire width be within the statutory limit.—*Taylor v. Parenteau,* 23 Colo. 368, 18 M. R. 534, 48 P. 505.

By Statute, in Wyoming, the discovery shaft must be equidistant from the side lines of the claim.

Record of Excessive Width.

The Surveyor-General will not issue an order for survey for patent upon a location certificate which claims, in terms, on its face, more than the total width allowed or with an excess of more than one-half of the legal width on either side of the center of the discovery vein, and it is doubtful whether any court would receive such certificate in evidence. Such mistakes are the work of surveyors who undertake to put their field notes into the form of a location certificate in total ignorance of what constitutes a valid location certificate. This document should be drawn by a competent attorney.

But there is nothing to prevent a location of one-half the statutory width on one side the center of the vein and *less* than one-half on the other side of such center line.

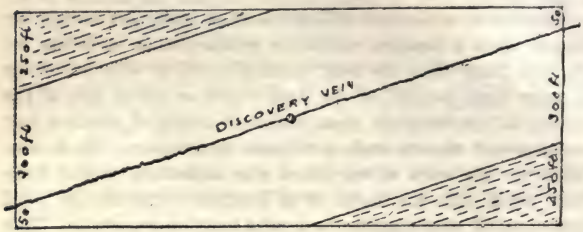
A location of excessive width is not void and a second location can not on such pretense take in the actual workings of the first party.—*McIntosh v. Price,* 121 F. 716, 58 C. C. A. 136.

Where the lines were in zigzag form, thus making excessive width, the department required an amended survey.—34 L. D. 470.

Excess by Vein Approaching Side Line.

It is true that it may not be known when the stakes are set what the course of the lode may be, and honest errors in this respect may readily be committed; but the vein being the basis of location, and it having been decided that when a vein leaves the side lines of its location, the claim both as to veins and surface beyond that point is void, it necessarily follows, where either side line is found at any point to be more than the legal distance from the center of the vein, that the location of such excess in width has not been based upon a vein lying within the statutory limits, and comes within the same reasoning which renders all that portion of the location void in which no

vein is found.—*Patterson v. Hitchcock,* 3 Colo. 533, 5 M. R. 542. But no such fact would vitiate any part of the claim after patent issued.—*Peabody Co. v. Gold Hill Co.,* 97 F. 657.



The above cut illustrates the preceding paragraph. The shaded ground shows an excess over the allowed 300 feet from the center of the vein. A valid hostile discovery could be made upon such shaded ground or a location made taking it in. The plat shows a claim of 600 feet width.

Excess—How Corrected.

The case of *McElligott v. Krogh,* 151 Cal. 126, 90 P. 823, serves further to illustrate the diagram and shows at the same time how the error is to be corrected and new lines established. Upon development after location the discovery vein of the Live Oak lode claim was found to run in such direction that its N. W. corner was 320 feet from the "middle of the vein," that is to say, 20 feet beyond the point at which it could legally be placed. The Appellate Court reset this corner by drawing it in 20 feet toward the vein and fixed the west side line, by drawing a straight line from the new corner to the point on the original west side line where the excess first began; allowing the original west side line to stand from that point to the S. W. corner which was within the 300 feet. See diagram, 90 P. 824.

But in the later case of *Harper v. Hill,* 159 Cal. 250, 113 P. 163, the Supreme Court held that an excess of over 300 feet from the center of the discovered lode was good to the entire

width, where the location was made in good faith. This distinction is not attempted in any of the other cases cited on this point and does not seem tenable.

DISCOVERY AND LOCATION OF LODES BEFORE THE ACTS NOW IN FORCE.

Mode of Location Not Strict.

Prior to 1866 there was no United States law regulating lode locations. Nor did that law state any definite formula further than to limit the extreme width and length. Nor were the requirements of the State or Territorial Legislatures usually specific. Either by statute or by district rule a discovery was always required and a notice at the point of discovery, and in many districts such a staking as would indicate the extreme points to which the claim extended. In 1866 by statute in Colorado a location stake and a ten-foot discovery shaft were required. In other States and Territories even these initial and essential points were left entirely to district regulations.

In all cases the actual disclosure of the vein, and not merely the float or indication of the vein, was required, and the stake was supposed to give the name of the lode and its locator, with usually the date of discovery and the number of feet in each direction.

That some act of location was required has never been disputed. But in the absence of district rules, what would amount to a sufficient location can only be defined as such acts of appropriation as would amount to a declaration that the locator had appropriated the ground, and be sufficient notice to other prospectors that he had so appropriated it.—*Hess v. Winder,* 12 M. R. 217, 30 Cal. 349; *English v. Johnson,* 12 M. R. 203, 17 Cal. 107, 76 Am. Dec. 574; *Attwood v. Fricot,* 2 M. R. 305, 17 Cal. 38, 76 Am. Dec. 567; *Gleeson v. Martin*

White Co., 9 M. R. 429, 13 Nev. 442; *Gonu v. Russell*, 12 M. R. 630, 3 Mont. 358.

In the case of *Cons. Rep. Co. v. Lebanon Co.*, 15 M. R. 490, 9 Colo. 343, 12 P. 212, it was ruled that the posting of the notice and the recording of certificate not followed by development or representation, would not hold the claim against a subsequent location. See also *Becker v. Pugh*, 15 M. R. 304, 9 Colo. 589, 13 P. 906.

DISCOVERY AND LOCATION UNDER LAWS NOW IN FORCE.

Discovery Required.

R. S. Sec. 2320. * * * No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * * —*Sec. 2, A. C. May 10, 1872.*

Staking and Record.

R. S. Sec. 2324.—The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. * * * —*Sec. 5, A. C. May 10, 1872.*

Discovery Shaft, Notice and Stakes in Colorado.

R. S. Colo. Sec. 4197.—Before filing such location certificate the discoverer shall locate his claim by:

First—Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well defined crevice.

Second—By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

Third—By marking the surface boundaries of the claim.—*Feb. 13, 1874.*

For the statutory requirements of the other mining States, see p. 68.

Corner Posts, Center Posts.

R. S. Colo. Sec. 4198.—Such surface boundaries shall be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim, and sunk in the ground to-wit: one at each corner and one at the center of each side line. Where it is practically impossible on account of bed rock to sink such posts, they may be placed in a pile of stones, and where in marking the surface boundaries of a claim any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place. —*Feb. 2, 1876.*

Open Cuts and Tunnel Discoveries.

R. S. Colo. Sec. 4199.—Any open cut, cross-cut or tunnel which shall cut a lode at a depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.—*Feb. 13, 1874.*

Time to Sink Discovery.

R. S. Colo. Sec. 4200.—The discoverer shall have sixty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon. —*Id.*

The Doctrine of Appropriation Would Have No Application

to mining and water claims on the Pacific Slope if the lands, before the discovery of minerals, had passed into the hands of private owners; nor to the government itself, if the government had chosen either to treat the miners as trespassers or to arbitrarily dispose of the lands at public sale. Instead of adopting any such policy, the United States for many years tacitly, and since 1866 by positive enactment,

opened the lands to the explorer and occupant; in other words, the mineral lands were offered to the first appropriator.

The Acts of Appropriation, As to Mineral Lands,

are equivalent to such acts as would amount to occupation in other cases; there must be an intent to possess the claim, such acts of appropriation as are sufficient to carry out this intention, and finally such acts must have such publicity by record as to operate as notice to all, that the lands have been actually appropriated.

The appropriation of a mine, the appropriation of water for mining or irrigating purposes, and the occupation of homestead land are therefore in substance the same, and differ only so far as the various subject matters differ, the criterion in each case being the intent of the occupant to segregate a certain portion of the public domain to his several use, followed by acts manifesting such intention with such publicity as is due to the rights of third parties.—*Sparrow v. Strong*, 2 M. R. 320, 3 Wall. 97, 18 L. Ed. 49; *Gore v. McBrayer*, 1 M. R. 645, 18 Cal. 583.

The Right of Appropriation Is Now Regulated

by statute to a greater or less extent in most of the States and Alaska, so that the appropriator must not only occupy the ground, but must segregate his claim and otherwise comply with the law, which attempts to reduce to detail the above general principles.

These statutes fix a time for the process of location and record and require certain acts to be done to constitute a valid location. In all the Western mining States except Utah the regulations are quite specific. They have copied the earlier Colorado Statute more or less closely. It is intended that a location made as in this chapter advised would be valid in any State or Territory, except where some specific statute calls for additional requirements. The details of location in each State are tabulated on page sixty-eight.

Where Location Begins and Ends.

It has been held that the word location does not necessarily include discovery. That a stipulation that certain lodes were "located in compliance with law" did not preclude an attack on the discovery.—*Uinta Co. v. Ajax Co.,* 141 F. 563, 73 C. C. A. 35.

The Supreme Court of Montana says that the acts which, taken together, amount to a location, begin with the discovery and terminate with the filing for record of the declaratory statement.—*Hickey v. Anaconda Co.,* 33 Mont. 46, 81 P. 811.

In *Smith v. Union Co.,* 166 Cal. 966, 135 P. 966, the word "location" is defined as including the record of the claim.

These decisions are not in accord and it may admit of scholastic discussion as to whether the act of visual discovery is part of the location, and also whether the filing of the record is parcel of the location or only proclamation of the fact of location.

Such points become material chiefly in cases where the doctrine of relation or of conclusive presumptions is invoked. In the Federal case they held that the patent did not prevent attack on the date of discovery, and in the Montana case that the date of filing for record was the date of location. See p. 119.

Discarding these technical distinctions the formal acts of appropriation are: (1) Discovery. (2) Location. (3) Record.

Discovery the Inception of Title.

The discovery of a lode of itself gives title to the vein for such length of time as is allowed by law for the completion of the location and record *(Murley v. Ennis,* 12 M. R. 360, 2 Colo. 300; *Erhardt v. Boaro,* 15 M. R. 472, 113 U. S. 527, 28 L. Ed. 1113, 5 Sup. Ct. 560); and when the location and record are made, if made in due time, the inception of title relates back to the date of discovery.—*Burke v. McDonald,* 3 Ida. 296, 29 P. 98. From this fact a later record may show

an older and better title than a record made several months earlier.—*Patterson v. Hitchcock,* 5 M. R. 542, 3 Colo. 533. For this reason it is advisable for the location certificate to recite the date of discovery as well as the date of location.

If the statute or district rule does not fix a specific time for the discoverer to follow up his discovery the common law allows him a *reasonable* time to do each act required.

Discovery Defined.

Discovery means the acquirement of knowledge that such a lode exists within the limits of the claim.—*Mason v. Washington Co.,* 214 F. 35, 130 C. C. A. 426.

The *bona fides* of a discovery is a question of fact for the jury.—*Rooney v. Barnette,* 200 F. 700, 119 C. C. A. 116.

Essentiality of Discovery—How Proved.

Where a location is made without discovery the land remains public domain until there be a discovery.—*Tuolumne Co. v. Maier,* 134 Cal. 583, 66 P. 863. The fact that the vendors had no valid discoveries may be proved in an action to recover the price of possessory claims sold to plaintiff.—*Whitney v. Haskell,* 216 Pa. 622, 66 Atl. 101.

The fact of discovery must be proved by the party alleging it as the inception of his possessory right.—*Sands v. Cruikshank,* 15 S. D. 142, 87 N. W. 589.

The location notice is not *prima facie* proof of discovery, but where both claimants posted their discovery notice at the same point it is a mutual admission that there was a lode discovered there.—*Fox v. Myers,* 29 Nev. 169, 86 P. 793.

Land Office Rulings on Discovery.

The sufficiency of proof of discovery in Land Office contest is considered in 40 L. D. 271; and its elements analyzed in 41 L. D. 320. A discovery on porphyry in no defined lode formation held invalid. 41 L. D. 242. *Id.* 255. Discovery must be made before filing application for patent.

43 L. D. 397. Discovery on a lode claim is mandatory and can not be waived by the Department. 41 L. D. 320. *Id.* 520.

Where the old discovery has been lost within the patent of another claim there must be a new discovery of the fraction remaining. 42 L. D. 481.

The Vein Must Be Reached.

The discovery is not complete until the vein itself is disclosed. The finding of float or loose quartz is not sufficient. There is a custom generally respected among miners, when any person has discovered indications of a lode and is diligently following up these indications, to allow thirty days in which to uncover the deposit; but if another, by a shorter cut, should first actually reach the vein, it would seem that the first prospector, except as qualified by the *Boaro case* cited below, could assert no priority; and such has been the tenor of the decisions.—*Upton v. Larkin,* 5 Mont. 600, 6 P. 66; *North N. Co. v. Orient Co.,* 9 M. R. 529, 1 F. 522, 6 Sawy. 299; *Overman Co. v. Corcoran,* 1 M. R. 691, 15 Nev. 417. In *Walsh v. Mueller,* 16 Mont. 180, 40 P. 292, the facts which constituted the discovery are stated and held such clear proof as warranted the reversal of a finding that there was no discovery.

The fact of discovery of the vein may be inferred, where not proven in specific terms, by the use, by witnesses, of expressions which would be meaningless except upon the assumption that they were speaking of a discovered lode.—*Conway v. Hart,* 129 Cal. 480, 21 M. R. 20, 62 P. 44.

Prospector's Rights Before Discovery.

If, however, a prospector has discovered float or other indications of the immediate presence of the vein and keeps diligently at work, such inchoate discovery has practically been held by the National Supreme Court in *Erhardt v. Boaro,* 15 M. R. 447, 113 U. S. 537, 28 L. Ed. 1116, 5 Sup. Ct. Rep. 565, equivalent to the discovery of the vein in place. If it does

not go so far as to decide that the prospector could at once locate upon such indications, it does decide that he has not only the right to be protected in his possession while following up such indications, but that he will be protected to the extent of a full claim when his location is complete.

Excluding the fact of the intimidation which was in proof in that case, it is difficult to reconcile the opinion with the Colorado Statute, which requires a well defined crevice to be disclosed, and with the language of the R. S. Sec. 2320, which prohibits any location until the discovery of the vein. Whatever the effect of the decision in giving precedence to the prospector upon the floe as against the actual discoverer of the vein itself, it ought at least to be certain that no such disclosure of indications short of uncovering the vein in place would hold as a discovery sufficient to stake and record upon and leave to the protection of the law, as the miner may do when his discovery, location and record upon the lode in place are once absolute and complete; but when accompanied by his actual presence on the ground with notice posted, the question of prior discovery in fact in such case remains a question for the jury.

A lode claimant before discovery has no right to protection except to the extent of his bare *pedis possessio.—Gemmell v. Swain,* 28 Mont. 331, 98 Am. St. Rep. 570, 72 P. 662, 22 M. R. 716.

The hope and expectation of finding can not avail to supplant the required disclosure in fact.—*Ambergris M. Co. v. Day,* 12 Ida. 108, 85 P. 109. But where the lessee of an oil placer claim is sinking a well, his rights will be protected against an attempt to claim the ground by locating him in.—*Weed v. Snook,* 144 Cal. 439, 77 P. 1023.

The Discoverer in Law Is Not Necessarily the Original

finder, but any one who, knowing of the existence of the mineral, takes some step toward an appropriation of the land which contains it.—*Nevada Co. v. Home Co.,* 98 F. 673, 20 M. R. 283; *Jupiter Co. v. Bodie Co.,* 11 F. 666, 7 Sawy. 96, 4

M. R. 411. It is assumed, of course, in such case that the original actual discoverer failed to perfect his initiatory first right by location. The vein may be disclosed in a pit sunk on it before by a stranger.—*Hayes v. Lavagnino,* 17 Utah 185, 53 P. 1029, 19 M. R. 485.

In *Zerres v. Vanina,* 134 F. 610, 614, it is said: "A relocator is not a discoverer of the mineral, but an appropriator thereof"; which expression, though literally true and correctly used as applied to the facts in that case, may be misleading if not qualified. A relocator must disclose the lode in his shaft the same as the original locator, and may do so at a point where the original discoverer never supposed it to exist, or by uncovering a new vein within the located ground. Technically, therefore, the relocator is a discoverer as much as the first finder of the lode, and in his record in States which require the date of discovery to be stated, he gives his "date of discovery" just the same.

A Location on Float Ore, the Discovery Opening Not Show-

ing the lode in place, has been expressly held to be invalid. Several tons of such ore had been extracted, but the vein itself from which it came had not been defined.—*Waterloo Min. Co. v. Doe,* 56 F. 685, 17 M. R. 586.

On the other hand an Idaho decision allowed a location to stand good made upon "indications of mineral," the report, however, leaving it very indefinite as to what these indications were.—*Burke v. McDonald,* 3 Ida. 296, 29 P. 98.

Discovery is a question of fact for the jury.—*Columbia C. Min. Co. v. Duchess Co.,* 13 Wyo. 244, 79 P. 385.

Discovery After Location.

If a location be made before discovery, but is followed by a discovery in the discovery shaft, before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid.—*McGinnis v. Egbert,* 8 Colo. 41, 5 P. 652, 15 M. R. 329; *Golden Terra Co. v. Mahler,* 4 M. R. 390;

Jupiter Co. v. Bodie Co., 11 F. 666, 7 Sawy. 96, 4 M. R. 411; *Zollars v. Evans*, 5 F. 172, 4 M. R. 407, 2 McCr. 39; *North Noonday Co. v. Orient Co.*, 1 F. 522, 6 Sawy. 299, 9 M. R. 529; *Erwin v. Perego*, 93 F. 608, 35 C. C. A. 482; *Nevada Co. v. Home Co.*, 98 F. 673, 20 M. R. 283; *Brewster v. Shoemaker*, 28 Colo. 176, 89 Am. St. Rep. 188, 53 L. R. A. 793, 63 P. 309, 21 M. R. 155; *Weed v. Snook*, 144 Cal. 439, 77 P. 1023; *Sharkey v. Candiani*, 48 Or. 112, 7 L. R. A. (N. S.) 791, 85 P. 219, and the Land Department has followed these rulings.—28 L. D. 526.

But where a location and record were made with no discovery, a subsequent discovery will not relate back and cut out an intervening location.—*Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 P. 948, 20 M. R. 591.

Discovery is good when it follows instead of preceding the acts of location.—*Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 P. 849.

A discovery after the adverse claim was filed is not available to the plaintiff.—*Healey v. Rupp*, 37 Colo. 25, 86 P. 1015.

Discovery and Discovery Shaft Distinguished.

The fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery. If a lode, for instance, be discovered in a cross-cut run to operate some other known vein, or if a prospect hole be dug on the outcrop of a lode, and no steps are taken to stake and record such hole, it becomes no more the property of the owner of the cross-cut, or of the party who dug the hole, than if he had never happened to strike it. Although he could have followed up the discovery by perfecting title, his neglect so to do is equivalent to abandonment of the inchoate right given by discovery.—*Willeford v. Bell*, Cal. Unrep. 679, 49 P. 6.

The Discovery Need Not Show Pay Ore.

It is sufficient that it disclose such a crevice as a miner would be willing to further open and follow.—*McShane v. Kenkle*, 18

Mont. 208, 56 Am. St. Rep. 578, 33 L. R. A. 851, 44 P. 979; *Shreve v. Copper Bell Co.*, 11 Mont. 309, 28 P. 315; *Muldrick v. Brown*, 37 Or. 185, 61 P. 428; *Fox v. Myers*, 29 Nev. 169, 86 P. 793. It need not show ore in commercial quantities.—43 L. D. 79.

Proof that there were "seams of mineral" without stating what the mineral was, is too vague to amount to proof that "valuable mineral" was discovered on the claim.—*Harper v. Hill*, 159 Cal. 250, 113 P. 162.

Comparative Size or Value.

If there is once found a lode such as is conceded to be one upon which a prospector may lawfully locate, and he has made such a discovery as justifies a location upon it, it makes no difference what its size or value as compared to the size or value of other veins asserting hostile title against such location.—*Book v. Justice Co.*, 58 F. 106, 125, 17 M. R. 617.

Proof of Mineral Contents.

The discovery must be of a mineral bearing vein or deposit. The proof of mineral value does not require an assay, although an assay if taken is of material value as evidence.—*Healey v. Rupp*, 28 Colo. 102, 63 P. 319, 21 M. R. 117.

What is quartz or mineral bearing rock is determinable by the eye in most cases and such ores as galena, zink-blende, copper pyrites and many others necessarily indicate mineral contents. There are, however, varieties of ochre and other discolored earth and rock which may or may not carry any kind of valuable mineral, in which instances an assay or other test in common reason should be required.

Proof of discovery may be aided by proof of the geology of adjoining claims. —*Cascaden v. Bortolis*, 162 F. 267, 89 C. C. A. 247, 15 Ann. Cas. 625.

Lode Found Outside of Discovery Shaft.

It has been decided in some of the states that although no lode was found in the discovery shaft, its disclosure elsewhere

within the claim before any adverse rights had accrued would validate the claim.—*Harrington v. Chambers,* 3 Utah 94, 1 P. 362; affirmed *Chambers v. Harrington,* 111 U. S. 350, 28 L. Ed. 452, 4 Sup. Ct. 428; *North Noonday Co. v. Orient Co.,* 9 M. R. 529, 1 F. 522, 6 Sawy. 299; *Tonopah Co. v. Tonopah Co.,* 125 F. 408. But to the contrary, in Colorado under its statutes is the case of *Van Zandt v. Argentine Co.,* 8 F. 725, 4 M. R. 441, 2 McCr. 159; *Terrible Co. v. Argentine Co.,* 89 F. 583; affirmed *Argentine Min. Co. v. Terrible Min. Co.,* 122 U. S. 478, 30 L. Ed. 1140, 7 Sup. Ct. 1356, 17 M. R. 109. And if it be true that the sinking of the discovery within patented lines or the patenting of the discovery shaft by a hostile claim invalidates the entire claim, and if the discovery shaft be, as it is, the point from which both length and width of the claim are determined, the point at which the notice is to be posted, and where it is required in terms by the language of the statute to show a well defined crevice, and the lode in place—it seems inconsistent to hold that discovery elsewhere would be of any avail when there was none in the discovery shaft.

This question has been decided in terms by the Supreme Court of Colorado; that a lode must be disclosed in the discovery shaft.—*McMillen v. Ferrum Co.,* 32 Colo. 38, 105 Am. St. Rep. 64, 74 P. 461; *Beals v. Cone,* 20 M. R. 591, 27 Colo. 473, 83 Am. St. Rep. 92, 62 P. 948.

In a Montana holding, based strictly on the construction of the statute in that State, it was ruled that the discovery shaft need not necessarily show the vein, provided it was disclosed elsewhere on the claim.—*O'Donnell v. Glenn,* 8 Mont. 248, 19 P. 302.

By Relocation Upon the Shaft Showing the Mineral After-

ward discovered, this danger can be avoided where no hostile discovery has intervened. But a new record based on a new discovery is an abandonment of the original location.—*Beals v. Cone, supra.*

The Point at Which a Lode Is Discovered Is Not Material.

It may be discovered at the surface where it outcrops above all surrounding country rock *(Score v. Griffin,* 9 Ariz. 295, 80 P. 331); or under the slide near the surface at its true apex, by shaft, open-cut or boom ditch; or at a greater depth by a tunnel cutting the vein horizontally across its dip, or by a shaft striking it perpendicularly upon the incline.

The Discovery Shaft Need Not Be Sunk at the Point Where

the lode was first actually discovered. The prospector has the right to choose a more convenient spot from which to base and outline his claim.—*Harrington v. Chambers,* 3 Utah 94, 1 P. 362; *Butte etc. Co. v. Radmilovich,* 39 Mont. 157, 101 P. 1078.

All Methods of Discovery, Whether by Shaft, Cut, Tunnel,

boom ditch or otherwise, are recognized by the statutes or district regulations everywhere, the only distinction being, where a discovery of a certain depth and showing certain things is required, that when discovered at the surface or in the slide there must be a shaft at least ten feet deep, or deeper if necessary, to show a well defined crevice; while if disclosed in a cross-cut or tunnel, the vein must be cut and a well defined crevice exposed, at least ten feet below the surface.

Discovery by Prospecting Drill.

The discovery of a lode or deposit by either horizontal or vertical drilling would doubtless fulfill all the conditions of a legal discovery, and would operate to give the party the time allowed to complete a discovery shaft; but the idea that a drill-hole would be considered as the equivalent of a discovery *shaft* can not be entertained. It would be a physical impossibility for such a drill-hole to show a well defined crevice, and a drill-hole is neither a shaft, cut nor other opening such as are enumerated among those things which may constitute a

discovery shaft or cut. The discovery of a lode is a matter of interest to the prospector only; but if he intends to appropriate the same it must be by such physical workings as shall amount to notice to third parties. A drill-hole is not a notorious, physical land mark, and could not be construed as such notice.

Discovery Holds How Long?

A discovery in Colorado, Wyoming, North and South Dakota, Montana and Oregon holds the claim for sixty days allotted to sink the discovery shaft.—*Marshall v. Harney Peak Co.*, 1 S. D. 350, 47 N. W. 290. Alaska, Arizona, New Mexico and Washington allow ninety days. Idaho allows sixty days, but claim must be staked within ten days after discovery. Nevada allows ninety days from date of posting location notice, but requires the monuments to be placed within twenty days from date of posting.

Where no specific time is limited, what is denominated a reasonable time is allowed in which to complete the location. What is a reasonable time depends upon circumstances, but it is not to be stretched indefinitely. In *Patterson v. Hitchcock*, 5 M. R. 542, 3 Colo. 533, it was ruled that ninety days to sink a shaft was more than a reasonable time. In *Doe v. Waterloo Co.*, 55 F. 11, 12, a prospector completed his staking in twenty days, and he was held to be in good time.

In a New Mexico case this language is used: "The locator is entitled to no appreciable time after discovery to determine whether he desires to locate and claim the benefit of his discovery. Discovery and posting notice of claim, therefore, must be practically cotemporaneous."—*Deeney v. Mineral Co.*, 11 N. M. 279, 67 P. 725, 22 M. R. 47.

If by discovery is meant mere ocular perception of an outcrop visible to all, it may be true, but everywhere else, where the discovery is the result of the labor of the prospector, he has, without doing any further act, a reasonable, or the statutory time, to perfect the location.

Notice Without Discovery.

A notice with no discovery to justify is of no avail.—*Gemmell v. Swain,* 28 Mont. 331, 98 Am. St. Rep. 570, 22 M. R. 716, 72 P. 662; *McPherson v. Julius,* 17 S. D. 98, 95 N. W. 428. And a notice not followed by staking does not make a location.—*Malecek v. Tinsley,* 73 Ark. 610, 85 S. W. 81.

Renewing Notice.

It seems useless to add that if the discovery shaft is not completed within the legal time it is mere folly to pull down the old notice and put up another of a later date. The sixty days or other statutory period, or the reasonable time, begin to run from the date of discovery, and no self-serving act of the prospector can enlarge the time. It is often attempted to evade this point and secure further time by posting a new notice with some other person named as discoverer.—*Ingemarson v. Coffey,* 41 Colo. 407, 92 P. 908.

Although the notice has been posted and reposted several times, if the location is ultimately completed before any third party comes on the ground, the claim is valid.—*Eureka Co. v. Tom Moore Co.,* 52 Colo. 623, 123 P. 655.

Location.

The location of a lode consists in defining its position and boundaries, and in doing such acts as indicate and publish the intention to occupy and hold it under the license of the United States.

The formal parts of location include:

1. The location notice at discovery.
2. The discovery shaft.
3. The boundary stakes.

The Location Stake.

The words "location notice," or "notice of location" require explanation. A location notice was in early stakings the principal and often the only specific act of location; it was a uni-

versal custom before any statutes existed purporting to regulate the subject.

It is now everywhere required by district rule or statute, but the states have divided themselves very evenly into two classes, (1) where they make it a mere memorandum notice; (2) where they make it equivalent to the location certificate and require a duplicate or substantial copy of it to be recorded afterward.

In Colorado, Montana, Nevada, North and South Dakota, Washington and Wyoming it is a memorandum notice containing the name of the lode, the name of the locator, and the date of discovery; where any additional item is required it will be found under "STATUTORY REQUIREMENTS," p. 68.

California, Idaho, Oregon, Utah, Arizona and New Mexico require it to contain a full description and later a duplicate or substantial copy must appear of record. As the record must show the date of location and there can not be a date before there is a location, this makes the date of posting the date of the location in those States.

How Posted.

Where only a memorandum notice is required the Statute or rule generally requires "a plain sign or notice," but there has never been any uniformity among prospectors in the details of the notice, or in the mode of posting it. It may be substantially complied with by writing on a blazed tree or on a board nailed at discovery, or by legible carving, or by any other rude but honest form of notice, so that it be intelligible and open to observation; but the loose practice of writing on a chip or stick thrown into the discovery hole is an attempt to evade or abuse the fair requirement of the law. In *Gird v. California Oil Co.*, 60 F. 531, 18 M. R. 45, the notice was placed in a tin can on a mound of stones and it was ruled a proper posting. Writing on paper held in place by a rock is sufficient.—*Emerson v. Akin*, 26 Colo. App. 40, 140 P. 481.

Place of Posting.

The location notice must be posted at the point of discovery, and where the discoverer placed his notice at a point where the vein was not disclosed but later posted it at the proper place the latter posting was not good to cut out an intervening claimant.—*Butte etc. Co. v. Radmilovich,* 39 Mont. 157, 101 P. 1079.

The notice was posted and a similar notice was recorded, when it was found that the posted notice was outside the claim; a new notice was then posted and it was held good. The order of posting and recording is not material, and the second notice did not need to be recorded.—*Green v. Gavin,* 11 Cal. App. 506, 105 P. 761; *McCleary v. Broaddus,* 14 Cal. App. 60, 111 P. 125.

In *Upton v. Santa Rita Co.,* 14 N. M. 97, 89 P. 275, the notice had been posted by mistake on the overlap of an older claim, but it was held that it did not invalidate the location.

FORM OF NOTICE ON STAKE.

THE FAMINE LODE, discovered by *Patrick Corcoran, February* 17, 1916. I claim 750 feet easterly and 750 feet westerly from discovery.

PATRICK CORCORAN.

This form fully complies with the law where no more is required than in Colorado and would still be sufficient without signing at the foot, and without stating the number or direction of feet claimed. But it is usual and always safe to cover those items and if others are added, as they often are, it is harmless surplusage.

Where the full notice is required, that is, where it is to be copied or duplicated into the record, it is, of course, written or written and printed on paper.

Such notice holds the claim for a reasonable time before setting the boundary stakes or other work.—*Union Co. v. Leitch,* 24 Wash. 585, 85 Am. St. Rep. 961, 64 P. 829.

This notice need not call for monuments or ties—that is required of the record only.—*Poujade v. Ryan,* 21 Nev. 449, 33 P. 660; *Brady v. Husby,* 21 Nev. 453, 33 P. 801.

A notice giving name of the lode, length, width and direction of claim, dated and signed; held a good compliance with the statute of Wyoming.—*Columbia Co. v. Duchess Co.*, 13 Wyo. 244, 79 P. 385.

THE COSTIGAN FORM.

Mr. Costigan, in his valuable Hand Book of Mining Law, gives the following form as a compliance with most, if not all, the local statutes:

Hawk Lode.

We, the undersigned, who discovered this mineral-bearing lode June 17, 1907, claim 1500 feet thereof, 750 feet easterly and 750 feet westerly from discovery, and three hundred feet on each side of the center of the vein. The general course of the vein is east and west.

JOEL B. ERHARDT, 4-5.
THOMAS CARROLL, 1-5.

and cites *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113, 5 Sup. Ct. 560, 15 M. R. 472, which sustained a much less complete notice.

Materiality.

As to the materiality of the notice the decisions of certain States hold that it is an essential act of location.—*Strepey v. Stark*, 7 Colo. 614, 618, 5 Pac. 111, 17 M. R. 28; *Cheesman v. Shreeve*, 40 F. 787, 17 M. R. 260; *Upton v. Santa Rita Co.*, 14 N. M. 96, 89 P. 275.

On the other hand there is a line of cases to the effect that the purpose of the location notice is literally what the term implies: that is, to give notice that the claim has been appropriated and that if the second locator had actual notice of the other acts of location the want of a location stake or notice or an erroneous call therein is not material.—*Bismarck Mt. Co. v. North Sunbeam Co.*, 14 Ida. 516, 95 P. 14; *Sturtevant v. Vogel*, 167 F. 448, 449, 93 C. C. A. 84. And the final authority of the Federal Supreme Court seems to strongly uphold the latter contention.—*Yosemite G. M. Co. v. Emerson*, 208 U. S. 25, 52 L. Ed. 374, 28 Sup. Ct. 196.

The location notice is not required to be recorded.—*McCleary v. Broaddus,* 14 Cal. App. 60, 111 P. 125. Its office is to give a reasonable time to prospect.—*Id.*

Right to Swing Claim.

In *Sanders v. Noble,* 22 Mont. 110, 55 P. 1037, the Never Sweat discoverers had posted their notice claiming 500 feet southerly and 1,000 feet northerly. During the ninety days allowed for filing location certificate other parties discovered the Yukon. They had read the Never Sweat notice and purposely kept clear of its ground. The Court held that the law gave the locators full ninety days to choose where they would ultimately fix their corners; that the Never Sweat locators were not estopped by their notice and could swing their location nearly at right angles and take in the Yukon ground. The opinion contains a full review of previous cases, but does not meet the proposition: that while the prospector may have such full time for such purpose he loses it the moment he by a positive act limits the general area which his monuments when set will include. We can not for a moment believe that a prospector after posting notice claiming 750 feet easterly and 750 feet westerly, could dispossess an intervening party who had sunk a hole 800 feet easterly from such notice. But such an instance is not at all distinguishable from the decision quoted. See *Wiltsee v. King of Arizona M. Co.,* 7 Ariz. 95, 60 P. 896.

Discovery Shaft Must Be on Public Domain.

The discovery shaft must be sunk upon unoccupied public land; that is to say, it must be outside of the lines of any patent or even of any valid location.—*Upton v. Larkin,* 5 Mont. 600, 6 P. 66; *Little Pittsburgh etc. Co. v. Amie Co.,* 17 F. 57, 5 McCrary 298; *Armstrong v. Lower,* 6 Colo. 393, 15 M. R. 631; *Golden T. Co. v. Mahler,* 4 M. R. 390, 4 P. C. L. J. 405; *Moyle v. Bullene,* 7 Colo. App. 308, 44 P. 69; *Watson v. Mayberry,* 15 Utah 265, 49 P. 479; *Tuolumne Co. v. Maier,*

134 Cal. 583, 66 P. 863; *Reynolds v. Pascoe,* 24 Utah 219, 66 P. 1064; *Peoria Co. v. Turner,* 20 Colo. App. 474, 79 P. 915; *Tiggeman v. Mezlak,* 40 Mont. 19, 105 P. 77; *El Paso Co. v. McKnight,* 233 U. S. 250, 251, 58 L. Ed. 943, 34 Sup. Ct. 498, L. R. A. 1915A, 1113; *Flynn Co. v. Murphy,* 18 Ida. 266, 138 Am. St. Rep. 201, 109 P. 851.

In the *Larkin-Upton case,* the discovery shaft was partly on patented ground, but a part of it showing the vein or a portion of the vein was on clear ground and its validity was upheld.—7 Mont. 449, 17 P. 728, 15 M. R. 404, 144 U. S. 19, 36 L. Ed. 330, 12 Sup. Ct. Rep. 614, 17 M. R. 465; *Nichols v. Williams,* 38 Mont. 552, 100 P. 969.

Plaintiff in an adverse claim suit must show that his location was on vacant public domain.—*McWilliams v. Winslow,* 34 Colo. 341, 82 P. 538.

The presence of abandoned cabins, old stakes and prospect holes are no proof that the land was not public domain.—*Cook v. Klonos,* 164 F. 529, 90 C. C. A. 403.

The defendant may show that plaintiff's discovery was upon land not subject to location and the claim therefore invalid.—*Girard v. Carson,* 22 Colo. 345, 44 P. 508, 18 M. R. 346.

In *King Solomon Co. v. Mary Verna Co.* the Court of Appeals of Colorado held that a witness should not be allowed to state in terms that the claim was located on the public domain, but should state facts from which the jury might so find.—22 Colo. App. 528, 127 P. 129.

Emerson, who owned the Victor lode, placed his location notice and sank his discovery of the Recompense lode within the lines of the Victor, an older claim which he owned, stating on the stand that he had at the time abandoned that part of the Victor lode. Under this dangerous and suspicious testimony he was allowed to escape the consequences usually following the sinking of the discovery on a prior location.—*Emerson v. Akin,* 26 Colo. App. 40, 140 P. 481.

Location Must Be Good, When Made.

"A location to be effectual must be good at the time it is made."—*Belk v. Meagher,* 104 U. S. 279, 285, 26 L. Ed. 735, 738, 1 M. R. 510. If made on the ground of a prior location, and therefore initiated by trespass, the subsequent abandonment of the prior claim does not make the later location good. —See citations on page 135.

Exceptional Cases—Town Site—Placer.

Assuming that all known lodes have been excepted from a Town Site Patent, a discovery shaft may be sunk upon and within the area of its patent.—*Moyle v. Bullene,* 7 Colo. App. 308, 44 P. 69.

The exclusion of known lodes from placer patents is a like instance and has been ruled the same way.—*Mutchmor v. McCarty,* 149 Cal. 603, 87 P. 85.

Patent Over Discovery Shaft.

Where a party allows a claim held by other parties to go to patent over his discovery shaft, "the loss of the discovery is a loss of the location."—*Gwillim v. Donnellan,* 115 U. S. 45, 29 L. Ed. 348, 5 Sup. Ct. Rep. 1110, 15 M. R. 482; *Miller v. Girard,* 3 Colo. App. 278, 33 P. 69; *Girard v. Carson,* 22 Colo. 345, 44 P. 508, 18 M. R. 346.

Where a senior claimant allows a location to be made over his discovery shaft and to go to patent, his claim becomes a void location not only as to such patent, but as to all persons and claims.

In an instance with special equities where an agricultural patent was issued covering that end of a lode claim in which all, or nearly all, the work had been done and where the clear end of the claim could be practically reached only by work commenced on the patented end, the court distinguished the case and held that *Gwillim v. Donnellan* did not apply.—*Richards v. Wolfling,* 98 Cal. 195, 32 P. 971; *Post* p. 162.

Bingham Co. v. Ute Co. holds that where mineral had been discovered elsewhere on the claim it was not invalidated by loss of its discovery shaft. But the opinion admits that this could not hold good in States like Colorado, which recognize no discovery outside of the discovery shaft.—181 F. 748.

After a claim has lost its discovery shaft by an overlapping patent, a second location on a new discovery is a new and independent location which gives the locator no rights as against an intervening locator.—*Indiana Co. v. Gold Hills Co.*, 35 Nev. 158, 126 P. 965.

Sale of Discovery Shaft.

But the sale of that part of the claim containing the discovery shaft does not invalidate the title of that part which the locator retains.—*Little Pittsburgh Co. v. Amie Co.*, 17 F. 57, 5 McCrary 298. And in this case the grantees had afterwards gone to patent on the ground containing the discovery shaft, as parcel of another claim. A distinction can readily be drawn between this and the *Donnellan case, supra;* and yet they are so close that it may be considered dangerous to convey that portion of the lode containing the discovery without proper covenants against patenting it as parcel of another claim.

Claim Must Include Discovery Shaft.

It is self-evident that the claim must include the discovery shaft, and proof that by change of boundaries they were made so as to exclude the discovery shaft is admissible to defeat such location.—*McGinnis v. Egbert,* 8 Colo. 54, 15 M. R. 329, 5 P. 652.

A location of certain bounds upon a discovery shaft exterior to such bounds, upon a lode which on its strike would extend into the lines staked off, is a claim without a discovery and is void.—*Michael v. Mills,* 22 Colo. 439, 45 P. 429.

An underground discovery in another claim aided by finding quartz on surface of the claim in controversy was held suffi-

cient to support the location in *Reiner v. Schroder,* 146 Cal. 411, 80 P. 517.

A discovery shaft through which an end line runs is on the claim sufficiently to hold it.—*Tiggeman v. Mezlak,* 40 Mont. 19, 105 P. 77.

The Shaft Must Be Ten Feet Deep, by Statute in All the mining States except California, North Dakota and Utah. In the excepted States the discovery point may show the lode by a hole or cut sunk or driven to or on the vein; but if the discovery notice is posted on a naked outcrop no hole or cut is necessary unless required by district rule, or by statute as in North Dakota, which requires a shaft, but does not fix the depth.

By the Arizona Act of 1909, eight feet depth is required.

By the Alaska Act of 1915 the discovery must "at the time of location be defined upon the ground by the removal of so much of the surface material as may be necessary clearly to expose to view the discovery claimed and in such manner as to perpetuate its identity and preserve it so far as practicable from obliteration," which is a unique departure from the legislation on this point everywhere else.

A State Statute requiring a specific depth of ten feet is a valid exercise of the right of regulation allowed to the legislature under the Congressional Act.—*Sisson v. Sommers,* 24 Nev. 379, 77 Am. St. Rep. 815, 19 M. R. 286, 55 P. 829; *Beals v. Cone,* 27 Colo. 473, 20 M. R. 591, 83 Am. St. Rep. 92, 62 P. 948.

Depth—How Measured.

In those States requiring specific depth, the language of the statute requires the shaft to be at least ten feet from the lowest part of the surrounding surface. In the instance of a shaft started on a steep slope there might be two or three feet of difference between its two ends or sides. In the instance of a shaft sunk not vertical but following a vein with a heavy

pitch it is obvious that a slight difference would exist between a vertical measurement and a measurement following the pitch of the shaft, the latter measurement being the shorter distance and favoring the prospector. And although usually the measurement is taken vertically, yet in such case we do not see but that the measure following the dip would strictly conform to the law, unless, as in Montana, the statute mentions vertical depth, specifically.

It is obvious that a cut being equivalent to a shaft and the pitch of the vein varying to any degree between true vertical and the horizontal, it is impossible to say at what angle the cut would be so flat as to be no longer in strictness a shaft. But a pit dug on a blanket vein reaching down ten feet being a compliance with the law, and no more work being required on a blanket vein than on a fissure, the pit or shaft following the vein by measurement along the vein would be a compliance with the law without regard to its relation to the vertical.

A cut made on the outcrop of a vein in a cliff, 12 feet in height but only 4½ feet into the cliff, is not any form of a 10-foot discovery shaft or cut allowed by Colorado statute.—*Ingemarson v. Coffey*, 41 Colo. 407, 92 P. 908.

Precautions as to Depth.

After a shaft has been sunk ten feet, the ground at the collar may cave, or the shaft may become filled with *debris*, or the making of a platform or raised collar may make it difficult to ascertain the exact line of the original rim of the shaft, or to ascertain its original bottom. In view of these facts and of the essential importance of the shaft being full ten feet deep, it is always advisable to sink it two or three feet deeper and remove all ground for cavil or contention.

Subsequent Deepening of Shaft.

Where the discovery shaft has not reached the legal depth at time of record, but has been completed to that depth afterwards and *before any adverse rights have intervened*, such

discovery shaft is valid. This is a matter of course on the general ruling as to performance of the various acts of location being sufficient in all instances where complete before third parties assert rights, though not completed within the statutory period.—*McGinnis v. Egbert,* 8 Colo. 41, 15 M. R. 329, 5 P. 652.

Discovery Shaft Must Show Well Defined Crevice,

besides reaching a certain depth.—*Cheesman v. Shreeve,* 40 F. 787, 17 M. R. 260. "Crevice" means a "mineral bearing vein."—*Beals v. Cone,* 27 Colo. 473, 83 Am. St. Rep. 92, 20 M. R. 591, 62 P. 948.

If a crevice does not show in ten feet, the shaft must go deeper; if it appears sooner, the ten feet must still be completed. The crevice shows the lode discovered, the depth shows the lode appropriated. In the instance of a thin flat deposit, a ten-foot shaft might pass entirely through the vein, but it would still show the crevice in its sides and ends.

It Need Not Contain Ore or Mineral, But It Must Show

mineral bearing rock—that is, the gangue or crevice material of the vein.—*Copper Globe v. Allmann,* 23 Utah 410, 64 P. 1020, 21 M. R. 296; and it is error to omit this, as one of the essential elements of a discovery shaft in an instruction purporting to define such elements.—*Bryan v. McCaig,* 10 Colo. 309, 15 P. 413. It need not show pay ore.—*Muldrick v. Brown,* 37 Or. 185, 61 P. 428.

Discovery Shaft Need Not Show Wall.

It had been decided in Montana (*Foote v. National Co.,* 2 Mont. 402, 9 M. R. 605) that at least one wall of the lode must be disclosed before the vein can be considered as discovered. But this decision made the discovery dependent upon a single incident, which is not by any means the only proof of the existence of a vein. This case, as well as *O'Donnell v. Glenn,* 8 Mont. 248, 19 P. 302, was based on a requirement of the Mon-

tana statute to such effect (since repealed), and not upon reason or the nature of the subject matter, and has therefore no pertinency to discoveries made under the regulations of an entirely different statute, or in territory where there is no statutory regulation of the subject.—*Fleming v. Daly,* 12 Colo. App. 439, 55 P. 947. There are certain classes of deposits which are doubtless lodes or veins within the intent of the Act of Congress, which show no well defined walls after thorough development, much less within that amount of working which is required as the basis of a record.

Shaft Through Slide or Country.

Nor does it make any difference that the shaft is started in slide or upon a stratum of country rock, if it pierce through the slide or country and find a crevice at a depth of ten feet or more. Such a shaft fulfills all the statutory conditions. But it must reach the lode in place; it is not enough that it strike a mass of ore mixed with broken slide and country.—*Van Zandt v. Argentine Co.,* 2 McCr. 159, 8 F. 725, 4 M. R. 441; *Waterloo Co. v. Doe,* 56 F. 685.

Discovery in Broken Ground.

It is a common incident to find the lode at surface with its sides and body more or less shattered, or perhaps with the entire top of the vein broken over with the adjacent country. Such a lode is nevertheless in place. The shattering and breaking over are only mechanical accidents and no more destroy the position of the vein as a thing in place than a fault breaks the legal continuity of a vein followed on its strike.—*Jones v. Prospect Co.,* 21 Nev. 339, 31 P. 642, 17 M. R. 530.

Separate Discovery for Each Claim.

The attempt to locate two full claims upon one discovery *shaft* is a palpable fraud.—16 L. D. 1; *McKinstry v. Clark,* 4 Mont. 370, 1 P. 759; *Reynolds v. Pascoe,* 24 Utah 219, 66 P. 1064. It is sometimes alleged that two lodes cross in the dis-

covery shaft, but no ten-foot shaft can prove such fact if such a coincidence ever occurs, nor would it alter the law of the case if it did occur.

Open Cut, Adit and Tunnel Discoveries.

All the mining States which legislate specifically on the subject practically follow the Colorado Statute providing that discovery by means of an open cut, adit, cross-cut or tunnel shall be equivalent to a shaft. Where the discovery is by cross-cut tunnel or open cut, it must show the lode at a depth of ten feet below the surface; that is to say, the breast of the cut or tunnel must be of that depth at its bottom to be the equivalent of a ten-foot discovery shaft; but where discovery is by an adit, the Colorado Supreme Court have ruled in two cases that it need not be ten feet deep, nor any specific depth, at the breast, but that the adit must be ten feet in length along the vein.—*Gray v. Truby*, 6 Colo. 278; *Electro Co. v. Van Auken*, 9 Colo. 204, 11 P. 80.

In the latter case they also held that an adit need not enter cover to be an adit. The effect of the latter decision is to confuse all the distinctions between an adit and an open cut, so that if the hole or stripping discloses ten feet in length of the vein, it may be styled an adit, although in fact an open cut. It is not safe to rely on this construction, and no prospector should consider his discovery complete until he has ten feet in depth at the breast of his cut, or a covered adit at least ten feet in along the vein.

The words "cross-cut" and "tunnel" are identical terms, except that the former is usually applied to short workings and the latter to those of greater length.

In States which have no such statute the law is the same upon general principles. It can make no difference to the government nor to the rights of other prospectors whether the discovery be by vertical or horizontal cutting. Either mode complies with both the letter and spirit of the law.

Under the Nevada Act allowing 240 cubic feet of excavation to count as a discovery cut, the removal of an accumulation

of caved down dirt in an old abandoned tunnel was held to count for such excavation.—*Murray v. Osborne,* 33 Nev. 257, 111 P. 31.

Duncan v. Eagle Rock Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 P. 588, 593, treats the words "discovery shaft" as a generic term including the discovery point in any form as used in the Mining Statute of Colorado, but holds that where used as a call or tie it has no such generic meaning and that a call for a discovery *"shaft"* is not satisfied by a discovery *"cut."*

Secret Underground Discovery.

The only class of discoveries which would suggest any difficulty is where, by extending the works of an old claim, a drift or an underground cross-cut or other working passes beyond the claim and discloses either a new vein, or the extension of the old vein into clear ground. We can not see any objection to locating such claim upon the discovery so made below, the notice being placed on surface at the proper point above the underground discovery and referring to such point of discovery.

In *Little Gunnell Co. v. Kimber,* Fed. Cas. No. 8402, 1 M. R. 536, a secret underground working from an old claim was not allowed to hold as a valid basis for relocation of an adjoining claim, but that decision was upon the letter of the Colorado Statutes concerning relocations which in terms requires a shaft to be sunk or other new opening to be made, nor had such secret discovery been followed by proper surface notice.

In *Butte Co. v. Barker,* 35 Mont. 327, 89 P. 302, 90 P. 177, defendant had run a cross-cut 102 feet long at 132 feet depth starting from a shaft on a patented claim owned by a third party, the cross-cut extending into new ground which new ground defendant had staked and marked on the surface at a point above the discovery. The location was held void under the Montana Statute, but the reasoning supporting the decision

is by no means persuasive. If such cross-cut were run by license of the patentee we can not see why it would not make a good discovery.

Notice and Staking Upon Cross-Cut Discoveries.

In the case of cross-cuts or tunnels not recorded under the Act of Congress, the point on surface above the discovery intended as the center line of the claim is the point at which the location notice is posted, and the stakes are placed to embrace an area in which this notice stands at a point on such center line. The discovery in the cross-cut will of course be on the same line carried down vertically unless an allowance is made for the dip. With the exception of the point of placing notice, no distinction exists in the process of locating and recording between these cases and those of surface discoveries.

Where the discoverer staked the claim on the projection of the dip found in his cross-cut (not a statutory tunnel) to surface, the location was held good.—*Brewster v. Shoemaker*, 28 Colo. 176, 89 Am. St. Rep. 188, 53 L. R. A. 793, 21 M. R. 155, 63 P. 309.

Discovery in Statutory Tunnel.

Where a lode is cut in a tunnel located and recorded so as to claim the rights of a prospecting tunnel under the Act of Congress (Sec. 2323) we advise, where practical, a posting, staking and recording of each lode as it is cut, exactly as in the case of discovery in an unrecorded cross-cut. But it has been held that such discovery in a located tunnel is good and will hold without any staking on the surface against a subsequent surface discovery.—*Ellet v. Campbell*, 18 Colo. 510, 33 P. 521. In the case referred to a notice had been posted at the mouth of the tunnel and a record had been made reciting the discovery in the tunnel and claiming the proper length and width, but not giving surface boundaries. This case was affirmed in the Federal Supreme Court, so that the question has now received final judicial construction. The Court, how-

ever, conceded that it may be true, as suggested in previous editions of the Mining Rights, that before a patent can be secured to the lode there must be a surface location.—*Campbell v. Ellet,* 167 U. S. 116, 42 L. Ed. 101, 17 Sup. Ct. Rep. 765, 18 M. R. 669.

Staking Boundaries.

That the staking of the surface boundaries of the claim has been required upon all surface locations made since May 10, 1872, has been repeatedly decided.—*Gelcich v. Moriarty,* 53 Cal. 217, 9 M. R. 499; *Hauswirth v. Butcher,* 4 Mont. 299, 1 P. 714; *Gohres v. Ill. Co.,* 40 Or. 516, 67 P. 666; *Deeney v. Mineral Co.,* 11 N. M. 279, 67 P. 724, 22 M. R. 47. These decisions are not made upon local statutes, but as the construction of R. S. Sec. 2324; nor can we see how any other construction can be contended for. It follows, therefore, that since May 10, 1872, surface staking along the bounds of the claim has been required in all cases, without regard to State, Territorial or District legislation requiring such staking. Such legislation, when it existed, has been to direct the details of the staking, but a sufficient staking has been required under the Act of Congress whether the local rule has been silent or outspoken on this point. The *Martin White* case, below quoted, is to the same effect and gives a full review of the different modes of location on the Pacific Slope.

It may be true in instances that hardship results under this provision; but it is better for a party to lose a portion of his vein by its departure from its staked lines, than that he be allowed to leave his vein and its course undetermined until a rich discovery in the vicinity suggest the time arrived to "prove up" and take his neighbor's lode. This is not a forced illustration—it is the very evil which the law is intended to prevent.—*Gleeson v. Martin White Co.,* 13 Nev. 442, 9 M. R. 429; *Gonu v. Russell,* 3 Mont. 358, 12 M. R. 630; *Gilpin Co. v. Drake,* 8 Colo. 586, 9 P. 787; *Sweet v. Webber,* 7 Colo. 443, 4 P. 752.

Posting the discovery notice is not the equivalent of marking the surface boundaries.—*Doe v. Waterloo Co.*, 70 F. 456, 17 C. C. A. 190, 18 M. R. 255.

Compromise Boundary.

Long acquiescence in a compromise boundary line will estop the parties to dispute it.—*Montana Co. v. St. Louis Co.*, 183 F. 51, 105 C. C. A. 343.

Overlap on Prior Claims.

The setting of stakes on prior locations or patents has been held valid. Such surveys are sustained with the reservation that such technical trespass is accomplished without breach of the peace.— *Del Monte Co. v. Last Chance Co.*, 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895; *Bunker Hill Co. v. Empire State Co.*, 109 F. 538, 48 C. C. A. 665; *Davis v. Shepherd*, 31 Colo. 141, 72 P. 57, 22 M. R. 575, 30 L. D. 420, 31 L. D. 121. See *Clark v. Mitchell*, 35 Nev. 447, 130 P. 760, 134 P. 449.

But the overlap belongs, of course, to the prior claim, and doing the location work upon a prior subsisting claim which has kept up its annual labor initiates no title at all in the new location.—*Anderson v. Caughey*, 3 Cal. App. 22, 84 P. 223; *Hoban v. Boyer*, 37 Colo. 185, 85 P. 837.

Where by mistake the location notice was posted on the overlap it was held that this did not avoid the location.— *Upton v. Santa Rita M. Co.*, 14 N. M. 96, 89 P. 275.

Fractional Claims.

Where the surrounding ground has been taken up so that only a fraction remains to be located, perhaps three cornered or otherwise irregular in shape, while a location conforming itself to the lines of the vacant area would be good for the ground covered and for everything enclosed by its vertical planes *(Crown Point Co. v. Buck*, 97 F. 462, 38 C. C. A. 278).

it is advisable to take up such vacant area as a parallelogram with parallel end lines so as to secure extralateral rights which would otherwise be lost. The fact that some or all the corners in such case would be on foreign ground would not invalidate. —*McElligott v. Krogh,* 151 Cal. 126, 90 P. 823.

The Locator Owns Only What His Lines Enclose,

although not chargeable with fault in making them. It is better for him to lose part of the lode than to make title dependent on the result of developments made after lines have been chosen.—*Iron Silver Co. v. Elgin Co.,* 118 U. S. 196, 15 M. R. 641, 30 L. Ed. 98, 6 Sup. Ct. Rep. 1177.

Three Months to Complete Staking Is the Time Allowed

by implication from the Colorado Statute. The discoverer has sixty days to complete his discovery shaft and three months to record. If his staking is completed at any time within three months, that is, within the period allowed between the date of discovery and when the record must be made, it is in apt time. He is allowed less time to sink his discovery than to set his stakes, because he may know, as soon as his vein is disclosed, where to sink; but he can not so readily know the course of the vein, and consequently needs time for this part of the location, inasmuch as, his stakes once set, he covers no more of his vein than lies within them.—*Erhardt v. Boaro,* 113 U. S. 527, 15 M. R. 472, 28 L. Ed. 1113, 5 Sup. Ct. Rep. 560.

If the setting of his stakes is delayed beyond the period of three months, the location is not invalidated where no adverse rights have intervened.—*McGinnis v. Egbert,* 8 Colo. 41, 15 M. R. 329, 5 P. 652; *Crown Point Co. v. Crismon,* 39 Or. 364, 65 P. 87.

The Statute allows a specific length of time to the locator to learn in what direction to stake his claim.—*Street v. Delta M. Co.,* 42 Mont. 371, 112 P. 701.

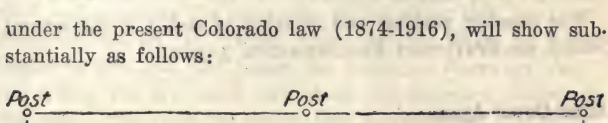
When the time to complete staking is not fixed by statute or district rule, a reasonable time is allowed. Twenty days has been held to be a reasonable time.—*Doe v. Waterloo Co.*, 70 F. 456, 17 C. C. A. 190, 18 M. R. 255.

All Statutes Limiting Time to Perfect Location

and record are directory where there is but a single claimant, or but one set of claimants, and delay becomes material only where the rights of third parties have intervened.—*Healey v. Rupp*, 37 Colo. 25, 86 P. 1015; *Columbia Co. v. Duchess Co.*, 13 Wyo. 244, 79 P. 385.

The Diagram of a Lode Correctly Located,

under the present Colorado law (1874-1916), will show substantially as follows:



ELEMENTS OF LOCATION.

1st. Discovery Shaft at Least Ten Feet Deep

from the lowest part of the rim at the surface, and showing a well-defined crevice.

2d. Location Stake; a Plain Sign or Notice

containing the name of the lode, the name of the locator, and the date of discovery.

3d. Center Stakes; Two Substantial Side Posts

sunk in the ground and hewed or marked on the side which is *in* toward the claim. These side posts must be sunk in the

center of each side line; that is, in a 1,500 foot claim, 750 feet from each end line.

4th. Corner Stakes; Four Substantial Posts,

one at each corner of the claim, sunk in the ground and hewed or marked on the two sides which are *in* toward the claim.

5th. Extra Angles.

It is the invariable custom where there are angles in the side line, to place a stake, hewed on the side *in* toward the claim, at each angle.

For number, position and marking of stakes in the several States, see STATUTORY REQUIREMENTS, page 68.

Must Cover Apex.

The stakes of the location must include the apex of the vein, and in so far as they fail so to do the claim is defective to that extent. That is to say: the theory of the statute is that a normal location will cover the apex of a vein and have the right to follow the vein on the dip. If the location fail to cover the apex and the lode dips *away* from the claim, so much of the vein is clearly lost; if after losing the apex the location is laid so as to cover the vein on its pitch underneath the side lines as it dips back into or under the side lines, it is still lost to the locator and is held to belong to such outside claim as may cover the apex beyond the point of departure. See page 212.

Locating Without Aid of Surveyor.

In locating any class of claim, a survey is always advisable.

If the prospector, however, can not procure a professional surveyor (and it is often impracticable), a reasonable degree

of care will suffice to locate his boundaries with certainty sufficient to make the subsequent record valid.

The record is merely a description of the claim as staked on the ground; if not properly staked the record does not make a good location, but if the location has been properly made, the record can readily be made to describe it fully, whether such location has been made by a surveyor or otherwise.

The discovery shaft being taken as the center of the claim and the initial point of location, a tape measurement from its center 300* feet at right angles to the lode reaches to the point where a center stake must be set; return to discovery shaft and continue the same line on the other side the same direction and set the second center or side stake; at right angles to this line and across the center of discovery shaft run a line 750 feet each way along the supposed course of the lode. This gives the center line lengthwise of the claim, and from each end of this center line measure 300 feet on each side for the end lines on the same course as the *line between the center stakes,* which will give the four points at which to set the corner stakes, and will also make the end lines parallel as required by law.

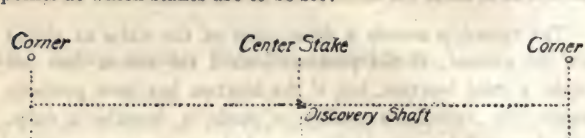
Measuring the length of the claim along its center, with an offset of 300 feet at right angles in each direction at discovery shaft and at each end, brings the same result as if both the side lines as well as the end lines were measured.

Diagram of Lines to Be Run.

The dotted lines on the following diagram show the four

*Three hundred feet in Alaska and all States except North Dakota; 150 feet in North Dakota; 150 feet in Clear Creek, Gilpin, Boulder and Summit Counties, Colorado, and 300 feet in all other counties. This 300 or 150 feet is, of course, one-half the width of a 600 or 300 foot wide claim.

lines to be measured on a prospector's survey, and the six points at which stakes are to be set:



Staking and Marks on Stakes.

At each of the four real corners of the claim, at the center of each side line and at each extra angle made in the claim, set a substantial stake, blaze it and mark the blazed part with its proper number and the name of the lode. In addition to the number write "North center side stake," "South center side stake," "N. E. Cor.," etc., as the case may be, and put the name of the lode on each stake.

The Statute of Colorado requires each stake to be hewed or marked on the side or sides in toward the claim. This would be satisfied by blazing alone, but it is customary to shave the *in* side (which indicates the relation of the stake to the claim) and mark with pencil the name of the lode, number of corner, etc., as above directed.

Marking three out of four corners was held sufficient in a Utah case.—*Warnock v. DeWitt,* 11 Utah 324, 40 P. 205. Review of citations on the point of sufficient staking.—*Howeth v. Sullenger,* 113 Cal. 547, 45 P. 841.

Where not required by statute it is not essential to put the name of the claim on the boundary stakes.—*Smith v. Newell,* 86 F. 56; *Bingham Co. v. Ute Co.,* 181 F. 748.

Numbering the Corners.

Any corner may be called No. 1; call the other corner on the same end line No. 2, and proceed thus continuously around the claim, setting an additional corner post at each angle

of the claim. Except in official surveys there is no uniform rule as to which corner is numbered one. *Rule* 138.

Position of Center Stakes.

In the case of the *Hardin Lode,* the claim was surveyed 600 feet in one direction and 900 feet in the opposite direction from center of discovery. The center stakes were placed opposite discovery, which left them each 150 feet from their proper places. The Supreme Court held that they could not be considered as substantially in the center; but on the other hand, held that if the corner posts were properly on the ground, the absence of center stakes did not invalidate the location.—*Pollard v. Shively,* 5 Colo. 309, 2 M. R. 229.

Tying the Claim.

In addition to staking the boundaries it is essential to have sufficient ties by which to identify the claim in the location certificate. The use of the bearings to mountain peaks used by surveyors with instruments is impracticable in this kind of survey—take, instead of such monuments, marks carved on prominent boulders or prominent blazed trees, neighboring shafts or shaft-houses. Anything which is a "natural object" or "permanent monument" (and reasonably substantial and prominent) is sufficient to identify the claim. From the center of the discovery and from at least one of the corner posts, take careful measurements of the exact distance to such monuments (the most prominent possible under the circumstances) as have been selected to use in the location certificate to tie, describe or identify the claim.

No specific number of ties are required, but at least two different monuments should be selected for such purpose.

What Are Sufficient Ties.

A tree blazed or otherwise referred to by some peculiarity as in *Quimby v. Boyd,* 8 Colo. 194, 6 P. 462, "a double spruce tree," has been declared a sufficient monument. In certain

places trees might be the only objects available, and have been considered good boundary monuments or witnesses from time immemorial. A neighboring shaft or a prominent post firmly fixed in the ground is a good monument.—*Jupiter Co. v. Bodie Co.*, 11 F. 666, 7 Sawy. 196, 4 M. R. 412. Mountain peaks are good calls.—*Craig v. Thompson*, 10 Colo. 517, 16 P. 24.

A tie to a corner of an unpatented claim is presumptively a good tie.—*Londonderry Co. v. United Co.*, 38 Colo. 480, 88 P. 455.

In *Vogel v. Warsing*, 146 F. 949, 77 C. C. A. 199, a call for a mountain by name, with course a mile distant, was held a sufficient tie.

Calling for Adjoining or Neighboring Claims.

The earlier decisions were to the effect that a call for another mine or claim was not a call for a permanent monument, and that a location certificate having such a call and no other, or no other sufficiently specific, was not a compliance with R. S. Sec. 2324.—*Baxter Co. v. Patterson*, 3 N. M. 179, 3 P. 741; *Drummond v. Long*, 9 Colo. 538, 13 P. 543, 15 M. R. 510; *Gilpin Co. v. Drake*, 8 Colo. 586, 9 P. 787. As late as 1896 an extreme ruling to the same effect was made in an Idaho case, *Brown v. Levan*, 4 Ida. 794, 46 P. 661, overruled in 1902 by *Morrison v. Regan*, 8 Ida. 291, 67 P. 955, 22 M. R. 69.. In the location certificate in the *Levan Case* the first call was "about one-half mile from the Hurt mines, the direction being Southwest." That call of itself was indefinite enough, but the paper also called for three adjoiners. The Statutes of Idaho (at that time) required adjoining claims to be named. The Court held that such call for adjoiners did not aid the tie to the Hurt group of mines. If the call for the adjoiners of itself made a good description we can not see why such call should be rejected as not aiding the defective tie to the Hurt mines, from the mere fact that to call for adjoiners was a statutory requirement of the location certificate.

All the later cases hold that a call for even a single claim, either as an adjoiner or near neighbor, makes a sufficient description. That a mine or mining claim may be a permanent monument and that if not so developed or known as to be a permanent monument the proof of such fact is upon the objecting party.—*Book v. Justice Co.,* 58 F. 106, 17 M. R. 617; *Riste v. Morton,* 20 Mont. 139, 49 P. 656; *Kinney v. Fleming,* 6 Ariz. 263, 56 P. 723, 20 M. R. 13; *Seidler v. Lafave,* 4 N. M. 369, 20 P. 789, overruling the *Baxter case, supra; Shattuck v. Costello,* 8 Ariz. 22, 68 P. 529, 22 M. R. 136; *Street v. Delta Co.,* 42 Mont. 371, 112 P. 701.

A notice calling for adjoiners on all four sides was held valid, although the claim was described as in a quarter section different from the true one.—*Duryea v. Boucher,* 67 Cal. 141, 7 P. 421.

Description by Degrees and Minutes Not Essential.

A record based on a location made as above directed, the corners and side stakes being marked and the notice set, which so identifies the situation of the claim (by reference to natural objects or permanent monuments tied to its discovery shaft or corners) that it may be readily found by a stranger examining the record, and for courses calls for some certain general direction and otherwise complies with all the statutory requirements herein stated—is as valid as one which calls for degrees, minutes, metes and bounds.

Indefinite Description.

Location certificate describing claim as "No. 1 on Bear Creek," with little or no further description, held void.—*Cloninger v. Finlaison,* 230 F. 98.

The Terms "Southerly," "Northerly," Etc.,

as used by miners in location certificates and notices, are not to be read as due south or due north so as to defeat the location.—*Smith v. Newell,* 86 F. 56; *Glass v. Basin Co.,* 22 Mont.

151, 55 P. 1047; *Wiltsee v. King Co.*, 7 Ariz. 95, 60 P. 896. And the word "west" may be read "east" when necessary to close upon the starting corner.—*Upton v. Santa Rita Co.*, 14 N. M. 96, 89 P. 275.

In Montana the holding was made that a notice of location describing the course of the vein as north and south was good to support a location on a vein running east and west.—*Butte Co. v. Radmilovich*, 39 Mont. 157, 101 P. 1078.

Precautions at Time of Location.

The side and corner stakes being properly set, the location notice fixed and properly inscribed, and the distance to ties or monuments measured, take the precaution at the time to measure the depth of the discovery shaft to see that the full ten feet in depth exist, recollecting that the collar is apt to cave in and the bottom to fill up with soil, inviting an attack on the location for want of legal discovery. Note the exact result of this measurement on the location stake.

Size of Stakes, Etc.

The Colorado Statute says that the posts shall be *substantial* and shall be *sunk in the ground*. The Land Office regulations, on survey for patent, require them to be not less than four inches in diameter, three feet long, and set eighteen inches in the ground; if of stone, twenty-four inches long.—*Rule* 143.

Trees, Stumps and Boulders As Corner Posts.

In *Pollard v. Shively*, 5 Colo. 309, 2 M. R. 229, the court held that a stump properly marked might be adopted as a boundary stake, and there is no doubt that a stone post literally complies with the law. And the calling for trees as corners, when in fact stakes stood for corners, has been treated as immaterial error, when there were other calls by which to fix the claim.—*Upton v. Larkin*, 7 Mont. 449, 17 P. 728, 15 M. R. 404; *Hansen v. Fletcher*, 10 Utah 266, 37 P. 480. The

L. O. Regulations also recognize both stones and rock in place. —*Rule* 143.

Cutting a letter into a solid rock held not equivalent to a stake.—*Taylor v. Parenteau,* 23 Colo. 368, 48 P. 505, 18 M. R. 534.

Where Stakes Can Not Be Set.

Where a stake can not be driven on account of bed-rock, it should be fixed in a pile of stones and in official surveys this marking is required in all cases. Where a stake can not be set on account of precipitous ground, the witness stake should be set as near as possible and on it should be expressed the course and distance to the corner or center stake, for which it is a substitute. The provisions of the Colorado Statute on this point (p. 23) can not be invoked where the setting of the stakes is merely difficult or inconvenient.—*Croesus Co. v. Colorado Co.,* 19 F. 78. Where the stakes on one end of the claim were not set, merely because the point was difficult of access, it was held that the claim was not valid.—*Id.* A like ruling was made where a corner fell upon a railroad embankment.—*Beals v. Cone,* 27 Colo. 473, 83 Am. St. Rep. 92, 20 M. R. 591, 62 P. 949. And as a matter of course, the failure to set them through inadvertence or neglect would be fatal.—*Patterson v. Tarbell,* 26 Or. 29, 37 P. 76.

Variation Between Courses and Monuments.

As the result of carelessness, accident or defective instruments, variations between the courses called for in the record and the monuments on the ground, are matters of constant occurrence. The general rule in such cases is that the monuments control.—*Cullacott v. Cash Co.,* 8 Colo. 179, 15 M. R. 392, 6 P. 211; *Book v. Justice Co.,* 58 F. 106, 17 M. R. 617; *Stonewall Co. v. Peyton,* 39 Fla. 726, 23 So. 440; *Galbraith v. Shasta Co.,* 143 Cal. 94, 76 P. 901; *Treadwell v. Marrs,* 9 Ariz. 333, 83 P. 350.

Corners Misdescribed—Monuments Lost.

It was held in the Hardin Lode case *(Pollard v. Shively)*, 5 Colo. 309, 2 M. R. 229, that the monuments would not control where they varied from the kind of monuments called for in the record; that a call for a "post" was not satisfied by a "stump." But in *Upton v. Larkin*, 7 Mont. 449, 17 P. 728, 15 M. R. 404, it was allowed to be shown that the pine trees called for as corners were really stakes. Where all the corners are gone the calls of the record should control rather than the recollection of witnesses. *Tiggeman v. Mrzlak*, 4 Mont. 19, 105 P. 77. Both the Hardin Lode case and this Montana case support the rule that to control the calls, the monuments must remain upon the ground. This rule is necessary to prevent the swinging of the location.—*Duncan v. Eagle Rock Co.*, 48 Colo. 569, 139 Am. St. Rep. 288, 111 P. 588; *Swanson v. Koeninger*, 25 Ida. 361, 137 P. 891.

Variations Chargeable to Connected Plat.

The U. S. Surveyor General of each State keeps what is called the "Connected Plat," purporting to show every approved survey in relation to each other on its proper section. Where the first survey on any section made an erroneous call for a Government corner, say 1300 feet, when the proper measurement was 1600 feet, it was platted as 1300 feet distant. A second survey correctly measured would show a certain distance from the corner, but, of course, would not tie to the first survey as traced on the connected plat. Instead of recognizing the error as soon as discovered the department persistently for years compelled each successive applicant to treat the first survey as correct and to tie to it accordingly.

This resulted in the issue of patents which really overlapped prior surveys, but the field notes appeared clear of any overlap; conversely, an overlap and consequent exclusion would appear where there was in fact no conflict with any prior survey.

It was to remedy this state of affairs that A. C. Sec. 2327 was amended in 1904 (p. 647). The effect of the amendment is, however, only to emphasize the common law rule declared in the *Cullacott* case above cited.

Patent for a full claim held to convey the entire 1500 feet, notwithstanding strong proof that the original corners were 135.5 feet short of that length. Sec. 2327, requiring that monuments control, held not to apply to a prior grant on the evidence in the case.—*Conkling Co. v. Silver King Co.,* 230 F. 561.

Maintaining Stakes.

Once properly set, stakes have performed their original office and their subsequent removal or obliteration not done by the act of the party does not vitiate the claim.—*Book v. Justice Co.,* 58 F. 107, 17 M. R. 617; *McEvoy v. Hyman,* 25 F. 596, 15 M. R. 397; *Smith v. Newell,* 86 F. 56; *Gobert v. Butterfield,* 23 Cal. App. 1, 136 P. 516.

But where not maintained, a misdescription in the record, otherwise immaterial, may become serious, if not fatal, as above stated, because to correct courses or other errors by monuments, the monuments must, in general, be found upon the ground.—*Meyer Co. v. Steinfield,* 9 Ariz. 245, 80 P. 400.

A Location May Be Made by an Agent,

and in such case written authority is not essential.—*Murley v. Ennis,* 2 Colo. 300, 12 M. R. 360; *Schultz v. Keeler,* 2 Ida. 305, 333, 13 P. 481; *Rush v. French,* 1 Ariz. 99, 25 P. 816; *Dunlap v. Pattison,* 4 Ida. 473, 95 Am. St. Rep. 140, 42 P. 504; *Moore v. Hamerstag,* 109 Cal. 122, 18 M. R. 256, 41 P. 805; *Whiting v. Straup,* 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 P. 849. In such case the location certificate should be signed by writing the name of the principal, followed by that of the agent—"*Barton A. Hopkins by J. Mason Hall, agent.*" In writing names on stakes and notices this is unnecessary—write only the name of the prineipal—because such a signing is not a

signature and it is immaterial by whom done so that the act is recognized or adopted by the party whose name is used. Even in subscribing the location certificate the names are often written by the party who makes out the body of the paper (without any mention of agency), and we do not apprehend that this invalidates the document. Such writings are obviously of a class different from deeds, notes, etc., where a name can be legally subscribed as a rule only by the party himself or by one fully authorized so to do by power of attorney or other formal authorization.—*Morton v. Solambo Co.*, 26 Cal. 527, 4 M. R. 463; *Gore v. McBrayer*, 18 Cal. 583, 1 M. R. 645; *Morrison v. Regan*, 8 Ida. 291, 67 P. 955, 22 M. R. 69.

Where a location is made in the name of a supposed principal there must either be a previous authorization to use the name of a principal or a subsequent ratification or adoption of the act. Where the name of an absent person is used without his knowledge there is no legal owner to the claim—no person to stand for its paternity—and the location is not good as against a later valid appropriation.—*Thompson v. Spray*, 72 Cal. 531, 14 P. 182.

A location may be made by the use of the name of another even without his knowledge if there is a local rule authorizing it or a subsequent ratification.—*Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 P. 850.

Discovery by an option holder perfects the title of the proposed vendor.—*Rooney v. Barnette*, 200 F. 700, 119 C. C. A. 116.

For agency locations in Alaska, see p. 635.

A Corporation May Locate.

This has been expressly decided in the cases of *McKinley v. Wheeler*, 130 U. S. 630, 32 L. Ed. 1048, 9 Sup. Ct. Rep. 638, 16 M. R. 65, and *Thomas v. Chisholm*, 13 Colo. 105, 16 M. R. 122, 21 P. 1019. It is required only that it be chartered under the laws of some federal State or Territory. It does

not have to show the citizenship of its stockholders.—*Doe v. Waterloo Co.*, 70 F. 463, 17 C. C. A. 190, 18 M. R. 265.

Minors.

The case of *Thompson v. Spray, supra,* holds that a minor child may make a valid mining location. Where a minor old enough to prospect and work locates a claim we do not see why his minority should invalidate his title, but the use of the names of minor children to obstruct creditors or for other sinister purpose should certainly be unable to resist attack made in proper form. Where a minor takes by descent his title is as unimpeachable as that of his ancestor.

By Government Employee—Deputy Surveyor.

Section 452, R. S., prohibits the location of government land by any officer, clerk or employee of the General Land Office. In *Lavagnino v. Uhlig,* 26 Utah 1, 99 Am. St. Rep. 808, 71 P. 1046, 22 M. R. 610, the Supreme Court of Utah held that a lode location by a Deputy Mineral Surveyor was void under said Section. *Waskey v. Hammer,* 170 F. 31, 95 C. C. A. 305, holds the same in strong terms. This case was affirmed in 223 U. S. 85, 56 L. Ed. 359, 32 Sup. Ct. Rep. 187, and the case to the contrary, *Hand v. Cook,* 29 Nev. 518, 92 P. 3, is of course nullified by the higher Federal construction. Nor can he make a mineral or homestead entry.—29 L. D. 333. 38 L. D. 346.

A mineral surveyor is interested when he owns stock in a corporation claimant.—40 L. D. 217.

Location Prevented by Colluding Co-Tenant.

If the staking and record are in fact not made the claim never becomes perfected, although the reason be that a co-owner violated his duty by colluding with third parties and allowing them to take up the ground. The sole remedy of the injured party is by appropriate action against his co-

owner, based on his fraud.—*Lockhart v. Wills,* 9 N. M. 344, 54 P. 336, 19 M. R. 497.

Where a location was made in the name of one out of two prospectors, who were equally interested, the single locator became trustee for his associate for one-half of the title; but an agreement merely to locate, not to work or develop, did not make them partners.—*Hendrichs v. Morgan,* 167 F. 106, 92 C. C. A. 558.

Locations Irregular in Shape.

The contemplation of the law is that a lode claim should be substantially a parallelogram.—*Del Monte case,* 171 U. S. 84, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895, 19 M. R. 370. But it seems that with the limitation that the length may not exceed 1,500 feet nor the width 600 feet a location may be made in any convenient shape, the only loss from such form of survey being that no extralateral rights can be claimed for a survey which has not parallel end lines. Surveys in the shape of a horse shoe and in the shape of a triangle respectively were considered in the *Stone Lode case (Iron Silver Co. v. Elgin Co.),* 118 U. S. 196, 30 L. Ed. 98, 6 Sup. Ct. Rep. 1177, 15 M. R. 641, and in *Montana Co. v. Clark,* 42 F. 626, 16 M. R. 80—and to both all dip-rights were denied. In the *North Star case,* 83 F. 658, 28 C. C. A. 333, 19 M. R. 118, both patents were of no conformable shape, but each of them had issued on a consolidation of claims located before 1872. "There is liberty of surface form under the Act of 1872."—*Walrath v. Champion Co.,* 171 U. S. 312, 43 L. Ed. 170, 18 Sup. Ct. Rep. 909, 19 M. R. 410.

Locating Across the Strike.

The loss of extralateral rights by such location is considered under APEX. In *Walsh v. Mueller,* 16 Mont. 180, 40 P. 292, location had been made, fraudulently, as was alleged in the complaint, across instead of along the strike. We can not see how fraud could be predicated upon such fact standing alone.

It simply loses the right to follow on the dip and the surface beyond the proper distance from center of vein is open to hostile location, as explained by diagram on p. 20.

Sunday.

In *Union Co. v. Leitch,* 24 Wash. 585, 85 Am. St. Rep. 961, 64 P. 829, the first act of location was done on a Sunday and in subsequent contest no point was made on this fact.

It has been intimated that where the last day of filing falls on a Sunday the locator is within the time if he files on the Monday following.—*Columbia Co. v. Duchess Co.,* 13 Wyo. 244, 79 P. 385.

Neglect of Statutory Details of Location.

Omission to establish center end stake (along with failure to verify the certificate) held fatal under Oregon Statute.—*Wright v. Lyons,* 45 Or. 167, 77 P. 81. The same as to corner stake in Colorado.—*Beals v. Cone,* 27 Colo. 473, 83 Am. St. Rep. 92, 20 M. R. 592, 62 P. 948. *Contra, Warnock v. DeWitt,* 11 Utah 325, 40 P. 205. Compliance with state law must be proved.—*Copper Globe Co. v. Allman,* 23 Utah 410, 21 M. R. 296, 64 P. 1019.

Parties made a location valid to the extent of the Congressional requirements, but failed to comply with the State Statute then in force. The State Statute was repealed while the locators continued in possession. *Held* that upon the repeal the location became valid. McFarland, J., dissents.—*Dwinnell v. Dyer,* 145 Cal. 12, 7 L. R. A. (N. S.) 763, 78 P. 247.

A location notice is not required by the U. S. Mining acts, nor at all if not called for by District Rule or Statute.—*Anderson v. Caughey,* 3 Cal. App. 22, 84 P. 223.

The case of *Street v. Delta M. Co.* contains a fair review of what constitutes a valid location in Montana. 42 Mont. 371, 112 P. 701. *McCleary v. Broaddus,* 111 P. 125, 14 Cal. App. 60, is a like case on location in California.

Fraudulent Locations.

The government will not patent locations made for the obvious purpose of securing control of a trail down a canyon and preventing its free use by the public.—36 L. D. 66.

TABLE OF STATUTORY REQUIREMENTS.

Indispensable Federal Requirements.

Whether demanded or not by State Statute or District Rules, the Federal Statute requires that the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and the location certificate must contain:

(1) The name or names of the locators.

(2) The date of the location, and

(3) Such a description by reference to natural object or permanent monument as will identify the claim.—R. S. Sec. 2324.

Before filing his location certificate the discoverer is required by statute in:

Colorado.

1. To post at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator and the date of the discovery.

2. Within sixty days from the discovery, to sink a discovery shaft ten feet deep, from the lowest part of the rim of shaft, or deeper, if necessary, to show a well defined crevice.

3. To mark the surface boundaries by six posts sunk in the ground, one at each corner and one at the center of each side line hewed or marked on the side or sides in towards the claim.

4. The disclosure of the lode in an open cut, cross-cut, or tunnel at the depth of ten feet below the surface, or an adit at least ten feet in along the lode, suffices instead of the ten-foot shaft.

5. Within three months from date of discovery to file a location certificate with the County Recorder giving a proper description of the claim, as required by Federal Statute, and containing also:

a.—The name of the lode;

b.—The name of the locator;

c.—The date of the location;

d.—The number of feet in length on each side of the center of the discovery shaft, and

e.—The general course of the lode.

Alaska.

LOCATION NOTICE.

(Act of 1915)

Section 11. The notice of location posted upon the claim must contain the following:

First—The name of the lode or claim.

Second—The name of the locator or locators.

Third—The number of linear feet claimed in length along the center line of the claim, each way from the point of discovery, with the width on each side of center line of the claim at the surface, and the general course of the vein or lode, as near as can be determined.

DISCOVERY.

Section 12. The discovery upon which the location is based must, at the time of location, be defined upon the ground by the removal of so much of the surface material as may be necessary clearly to expose to view the discovery claimed, and in such manner as to perpetuate its identity, and preserve it, so far as practicable, from obliteration; also its *locus* must be witnessed by erecting a substantial monument or post, bearing the notice of location, as near the discovery as practicable.

STAKES—LINE MONUMENTS.

Section 13. The locator must so define the boundaries of his claim upon the ground that they may be readily traced * * * . In no case shall the markings of the boundaries of the claim upon the ground consist of less than the following: The erection at each corner of the claim and at each angle in the side lines, if such there be, of a substantial monument or stake, or the blazing of a tree, at least three inches in diameter, each of which shall bear the initial of the lode or claim and a designation as to the point upon the boundaries of the claim

which the said monument represents. The center line and both end lines shall be marked by blazing trees or by cutting brush, or the erecting of line monuments, as the nature of the country requires so that the lines of the location may be readily traced upon the ground.

A reasonable time, not to exceed 30 days, is allowed to complete the staking. Sec. 13.

Within 90 days after posting the location notice, file with the recorder of the district a certificate which "must contain date of location, name or names of locator or locators, and such a description of the claim, with reference to some natural object or permanent monument, as will identify the claim located, and may also contain such further matter as will serve to more completely describe the boundaries and *locus* of the claim." Sec. 14.

Arizona.

1. Erect at point of discovery stone monument three feet high, or a post four feet above ground, on which post notice signed by locator containing:

a.—The name of the claim located;

b.—The name or names of the locators;

c.—The date of the location;

d.—The length and width of the claim in feet, and the distance in feet from the point of discovery to each end of the claim;

e.—The general course of the claim;

f.—The locality of the claim with reference to some natural object or permanent monument whereby the claim can be identified.

2. Within ninety days "from the time of the location" to sink a discovery shaft in the claim to a depth of at least eight feet from the lowest part of the rim of the shaft at the surface, and deeper if necessary, until there is disclosed in said shaft mineral in place.

3. Within same time mark boundaries by six substantial posts, projecting at least four feet above the surface of the ground, or by substantial stone monuments at least three feet high, to-wit, one at each corner, and one at the center of each end line.

4. Any open cut, adit, or tunnel which shall be made as above provided for, as a part of the location of a lode mining claim, and which shall be equal in amount of work to a shaft eight feet deep and four feet wide by six feet long, and which shall cut a lode or mineral in place at a

depth of ten feet from the surface shall be equivalent, as discovery work, to a shaft sunk from the surface.

5. Within ninety days from time of location, record with the County Recorder a copy of the location notice posted.

California.

A mining code was passed in 1897, but repealed in 1899. In 1909 the following was enacted:

The locator of a lode claim is required:

1. To post at the point of discovery a notice of location which notice must contain:

First—The name of the lode or claim.

Second—The name of the locator or locators.

Third—The number of linear feet claimed in length along the course of the vein, each way from the point of discovery with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be.

Fourth—The date of location.

Fifth—Such description of the claim by reference to some natural object or permanent monument as will identify the claim located.

2. The locator must define the boundaries of his claim so that they may be readily traced.

3. Within thirty days after the posting of the notice record a true copy thereof in the office of the County Recorder.

Idaho.

LODE LINE.

1. Mining claims hereafter located upon veins or lodes of quartz or other rock in place bearing any of the metals or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States may extend to three hundred feet on each side of the middle of the vein or lode; provided, that when the locators have set stakes, posts, or monuments described in the following section, to indicate the line of the vein, ledge, or lode, such stakes, posts, or monuments must be taken for the purpose of such location, to mark correctly the line thereof, and such line must not afterward be changed so as to affect rights acquired or interfere with any locations made subsequent thereto. *Rev. Code, Sec. 3206.*

DISCOVERY MONUMENT. LOCATION NOTICE.

2. The locator, at the time of making the discovery of such vein or lode must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery, and distance claimed along the vein each way from such monument. Within ten days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side-lines, a monument marked with the name of the claim and the corner or angle it represents; also at the time of so marking his boundaries, he must post at his discovery monument his notice of location, in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself, the location of the claim; and seventh, the name of the mining district, county, and state.

BOUNDING MONUMENTS.

When, from any cause, a monument can not be safely planted at the true corner or angle it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner or angle. Monuments may be made of any such material or form as will readily give notice, and when of posts or trees, they must be hewn and marked upon the side facing toward the discovery, and must be at least four inches square or in diameter. Monuments must be at least four feet high above the ground, and trees must be so hewn as to readily attract attention. At the time the locator so marks the boundaries of his claim he may do so in any direction that will not interfere with rights or claims which existed prior to his discovery. *Rev. Code, Sec. 3207.*

DISCOVERY SHAFT.

3. Within sixty days after such location, the locator or his assigns must sink a shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and of not less than sixteen square feet area. Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft, and which shall measure one hundred and sixty cubic feet in extent, shall be considered a compliance with this provision. Any located claim upon which work has been done in compliance with the above requirements is not, unless abandoned, subject to relocation for a period of ninety days from and after the date of location. *Rev. Code, Sec. 3208.*

RECORD.

4. Within ninety days after the location of the claim, the locator or his assigns must file for record in the office of the county recorder of the county, or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location. *Rev. Code, Sec. 3209.*

AFFIDAVIT.

Sec. 1. At or before the time of presenting a location notice for record, whether it be for a quartz or placer claim, one of the locators named in the same must make and subscribe an affidavit in writing on or attached to the notice, substantially as follows, to-wit:

State of Idaho, }
County of ..... } ss.

I, ..., do solemnly swear that I am a citizen of the United States of America (or have declared my intentions to become such), and that I am acquainted with the mining ground described in this notice of location, and herewith called ..... ledge, lode, or claim; that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this state, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and (in the case of quartz claims) that I have opened new ground to the extent or depth of ten feet as required by the laws of Idaho.

(Signature)..... .....

Subscribed and sworn to before me this ..... day of....., A. D. 19....

(Signature)..... .....

Rev. Code, Sec. 3216.

Montana.

(Act of 1907)

DISCOVERY NOTICE.

1. Post conspicuously at point of discovery a notice containing the name of the claim, name of locator, date of location, which shall be the date of posting, "and the approximate dimensions or area of the claim."

STAKING CORNERS.

2. Within thirty days after posting, place monument at each corner or angle, to-wit:

a.—A tree at least eight inches in diameter blazed on four sides.

b.—A post at least four inches square by four and one-half feet long, set one foot in the ground, unless solid rock occur at less depth, surrounded, in all cases, by mound of earth or stone, at least four feet in diameter by two feet high. A squared stump of same size and so mounded is the equivalent of a post.

c.—A stone at least six inches square by eighteen inches in length, set two-thirds of its length in the ground, with a mound of earth or stone alongside at least four feet in diameter by two feet in height, or

d.—A boulder at least three feet above the natural surface of the ground on the upper side.

The above classes of monuments (a-d) are enumerated as *prima facie* sufficient, but if others are used it shall be a jury question whether they sufficiently mark the location so that "its boundaries can be readily traced."

Each monument must be marked with name of claim and designation of the corner either by number or cardinal point.

DISCOVERY SHAFT OR CUT.

3. Within sixty days after posting sink discovery shaft of at least ten feet vertical depth below lowest part of the rim, or deeper if necessary, to disclose the vein. Cubical contents must be not less than one hundred and fifty cubic feet.

4. Any cut or tunnel which discloses the lode at ten feet vertical depth, with 150 cubic feet of excavation, is equivalent to a discovery shaft.

Where the vein is disclosed at less than ten feet depth any deficiency in the depth of the discovery may be compensated by equivalent work at other points on the claim. At least seventy-five cubic feet of excavation must show in the discovery shaft and the other seventy-five feet may be done elsewhere.

LOCATION CERTIFICATE.

5. Within sixty days after posting record with County Recorder certificate of location containing:

First—The name of the lode or claim.

Second—The name of the locator or locators, if there be more than one.

Third—The date of location and such description of said claim, with reference to some natural object or permanent monument as will identify the claim.

Fourth—The direction and distance claimed along the course of the vein each way from the discovery shaft, cut or tunnel with the width claimed on each side of the center of the vein.

6. The location certificate must be verified by one of the locators, or the authorized agent of the locators, or by any officer or agent of the company, when a corporation is the locator.

VERIFICATION.

State of Montana, } ss.
County of Silver Bow. }

Before me, the subscriber, a Notary Public in and for said county, personally appeared *Malcolm H. Carpenter,* to me personally known, who, being duly sworn, saith that he is a citizen of the United States and discoverer and locator of the *Asia* Lode described in the within certificate of location subscribed by him; that the claim is staked and located on the ground as in said certificate described, and that the location notice was posted at the point of discovery; and that the said certificate and all statements therein made are correct and true.

(Jurat) MALCOLM H. CARPENTER.

Nevada.

We print the whole of the three sections of the Act of 1900, amended in 1907. They seem to require a discovery shaft or cut, monuments at each corner and at the center of each side line, notice posted at time of discovery and a double record, one with the County Recorder and one with the District Recorder.

LOCATION NOTICE.

Sec. 1. Any person, a citizen of the United States or one who has declared his intention to become such, who discovers a vein or lode, may locate a claim upon such vein or lode by defining the boundaries of the claim in the manner hereinafter described, and by posting a notice of such location at the time and point of discovery, which notice must be posted upon one of the several monuments prescribed in Section 2 of this Act, and such notice must contain:

First—The name of the lode or claim;

Second—The name of the locator or locators;

Third—The date of the location;

Fourth—The number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode as near as may be.—*Rev. Laws of 1912, Sec. 2422.*

DISCOVERY SHAFT.

Sec. 2. The locator of the lode mining claim must sink a discovery shaft upon the claim located four feet by six feet to the depth of at least

ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show by such work a lode deposit of mineral in place; a cut or cross-cut or tunnel which cuts the lode at a depth of ten feet or an open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep, is equivalent to a discovery shaft.

DEFINING BOUNDARIES. SIZE OF STAKES.

The locator must define the boundaries of his claim by removing the top of a tree (having a diameter of not less than four inches) not less than three feet above the ground, and blazing and marking the same, or by a rock in place, capping such rock with smaller stones, such rock and stones to have a height of not less than three feet, or by setting a post or stone one at each corner and one at the center of each side line. When a post is used, it must be at least four inches in diameter by four and one-half feet in length set one foot in the ground. When it is practicably impossible, on account of bedrock or precipitous ground, to sink such posts, they may be placed in a mound of earth or stones, or where the proper placing of such posts or other monuments is impracticable or dangerous to life or limb, it shall be lawful to place such posts or monuments at the nearest point properly marked to designate its right place.

When a stone is used (not a rock in place) it must be not less than six inches in diameter and eighteen inches in length set two-thirds of its length in the top of a mound of earth or stone, four feet in diameter and two and one-half feet in height. All trees, posts or rocks used as monuments, when not four feet in diameter at the base, shall be surrounded by a mound of earth or stone four feet in diameter by two feet in height, which trees, posts, stones or rock monuments must be so marked as to designate the corners of the claim located.

TIME TO BOUND, SINK AND RECORD.

Provided, however, that the locator of a mining claim shall within twenty days from the date of posting the notice of location define the boundaries of said claim by placing at each corner and at the center of each side line one of the hereinbefore described monuments, and shall within ninety days of the date of posting said location notice perform the location work hereinbefore prescribed.—*Rev. Laws of 1912, Sec. 2423.*

LOCATION CERTIFICATE.

Sec. 3. Any locator or locators of a mining claim, after having established the boundaries of said claims, and after having complied with the provisions of this Act with reference to the establishment of such

boundaries, may file with the District Mining Recorder a notice of location, setting forth the name given to the lode or vein, the number of linear feet claimed in length along the course of the vein, the date of location, the date on which the boundaries of the claim were completed, and the name of the locator or locators.

DISTRICT AND COUNTY RECORD.

Should any claim be located in any section or territory where no district has been as yet formed, or where there is no District Recorder, the locator or locators of such claims may file with the County Recorder, notice of location as set forth above, and said notice of location will be *prima facie* evidence in all courts of justice of the first location of said lode or vein.

Within ninety days of the date of posting the location notice upon the claim the locator shall record his claim with the Mining District Recorder and the County Recorder of the mining district or county in which such claim is situated by location certificate which must contain:

First—The name of the lode or vein;

Second—The name of the locator or locators;

Third—The date of the location and such description of the location of said claim, with reference to some natural object or permanent monument as will identify the claim.

Fourth—The number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be;

Fifth—The dimensions and location of the discovery shaft or its equivalent, sunk upon the claim;

Sixth—The location and description of each corner, with the markings thereon.

Any record of the location of a lode mining claim which shall not contain all the requirements named in this section shall be void.

PRIOR RECORDS.

All records of lode or placer mining claims, mill sites or tunnel rights heretofore made by any Recorder of any mining district or any County Recorder are hereby declared to be valid and to have the same force and effect as records made in pursuance of the provisions of this Act. And any such record, or a copy thereof duly verified by a Mining Recorder or duly certified by a County Recorder shall be *prima facie* evidence of the facts therein stated.—*Rev. Laws of 1912, Sec. 2424.*

New Mexico.

1. Post in some conspicuous place on location a notice in writing stating thereon the name of the locator, his intention to locate the claim, and a description of the claim, by reference to natural object or permanent monument.

2. Within ninety days from date of taking possession sink a discovery shaft to a depth of at least ten feet from the lowest part of the rim, exposing mineral in place.

3. Mark surface boundaries by four substantial posts or monuments one at each corner of the claim so as to distinctly mark the claim on the ground so that its boundaries can be readily traced.

4. The disclosure of a lode in an open cut, cross-cut, or tunnel at the depth of ten feet below the surface, or an adit at least ten feet in along the lode, suffices instead of the ten-foot shaft.

5. Within three months after posting notice record a copy of such location notice in the office of the Recorder of the County.

North Dakota.

LOCATION CERTIFICATE.

1. The discoverer of a lode shall within sixty days from the date of discovery record his claim in the office of the register of deeds of the county in which such lode is situated by a location certificate, which shall contain:

First—The name of the lode;

Second—The name of the locator;

Third—The date of the location;

Fourth—The number of feet in length claimed on each side of the discovery shaft;

Fifth—The number of feet in width claimed on each side of the vein or lode;

Sixth—The general course of the lode, as near as may be.—*Rev. Code, Sec. 1802.*

DISCOVERY SHAFT. NOTICE. MARKING BOUNDARIES.

2. Before filing such location certificate the discoverer shall:

First—Locate his claim by first sinking a discovery shaft thereon sufficient to show a well-defined mineral vein or lode;

Second—By posting at the point of discovery on the surface, a plain sign or notice containing the name of the lode, the name of the locator

and the date of discovery, the number of feet claimed in length on either side of the discovery and the number of feet in width claimed on each side of the lode;

Third—By marking the surface boundaries of the same.—*Rev. Code, Sec. 1804.*

EIGHT POSTS.

3. Such surface boundaries shall be marked by eight substantial posts, hewed or blazed on the side facing the claim and plainly marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk in the ground as follows: One at the corner and one at the center of each side-line and one at each end of the lode. When it is impracticable on account of rock or precipitous ground to sink such posts, they may be placed in a monument of stone.—*Rev. Code, Sec. 1805.*

CUTS AND TUNNEL DISCOVERIES.

4. Any open cut, cross-cut or tunnel at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.—*Rev. Code, Sec. 1806.*

SIXTY DAYS TO SINK.

5. The discoverer shall have sixty days from the time of uncovering or disclosing a lode in which to sink a discovery shaft thereon.—*Rev. Code, Sec. 1807.*

Oregon.

1. To post notice containing name of lode, name of locator, date of location, number of feet in length claimed each way from discovery, width on each side of lode and "the general course or strike of the vein or lode as nearly as may be, with reference to some natural object or permanent monument in the vicinity thereof."

2. Within sixty days from date of posting to sink discovery shaft at least ten feet deep from lowest part of rim, or deeper, if necessary, to show lode or deposit in place.

3. Within thirty days after posting mark boundaries by six posts or mounds of stone, or earth and stone, one at each corner and one at center ends of claim; posts three feet above ground, four inches square or diameter; mounds two feet high.

4. A cut or crosscut or tunnel which cuts the lode at a depth of ten feet, or an open cut at least six feet deep, four feet wide, and ten feet in length along the lode from the point where the same may be in any manner discovered, is equivalent to such discovery shaft.

5. Within sixty days after date of posting, record with Recorder of Conveyances, if there be one, otherwise with Clerk of County, a copy of the notice posted attaching thereto an affidavit showing that required location work was performed.

6. By Act of 1905, Chap. 142, it was provided that an amended notice of location may be posted at any time, "which shall relate back to the date of the original location," with a proviso, saving intervening rights.

By Sec. 3974 Ballinger's Code, only one claim by location may be held upon each lead or vein, by the same person; the discoverer of any new lead or vein, not previously located upon, is allowed one additional claim.

South Dakota.

1. To post at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator and the date of discovery, the number of feet claimed in length on either side of the discovery, and the number of feet claimed in width on each side of the lode.

2. Before filing location certificate sink shaft sufficient to show a well defined mineral vein or lode, and not less than ten feet in depth on the lower side.

3. MARKING BOUNDARIES.—"Such surface boundaries shall be marked by eight substantial posts, hewed or blazed on the side or sides facing the claim and plainly marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk in the ground, to-wit: One at each corner and one at the center of each side line, and one at each end of the lode."

4. The disclosure of a lode in an open cut, crosscut, or tunnel at the depth of ten feet below the surface, or an adit at least ten feet in along the lode, suffices instead of the ten-foot shaft.

5. Within sixty days from the date of discovery, record in the office of the Register of Deeds a location certificate which shall contain:

First—The name of the lode;

Second—The name of the locator or locators;

Third—The date of location;

Fourth—The number of feet in length claimed on each side of the discovery shaft;

Fifth—The number of feet in width claimed on each side of the vein or lode;

Sixth—The general course of the lode, as near as may be.

6. When a location certificate is so filed the Register of Deeds is required to furnish to the locator a certificate giving the name of the location, the name of the locator or locators, the date of the filing, and the book and page where recorded, which certificate shall be delivered to the locator or locators, who shall post the same or a copy thereof on the said claim on the same post or tree where the original notice is posted and in a conspicuous place.

7. The Register of Deeds makes a notation on the margin of the record, giving the date of the delivery of such certificate, which notation is made *prima facie* evidence of the delivery and posting of the certificate.

Utah.

1. At the time of making discovery erect a monument and place thereon a notice containing name of lode, name of locator, date of location, length each way from discovery, width on each side of the center of the vein, general course of lode and description with reference to natural object or permanent monument.

2. There is no statutory requirement of a discovery shaft or cut of any specific dimensions but they may be required by district rules.

3. Claims must be distinctly marked on the ground so that the boundaries can be readily traced. Details of marking left to District Rules.

4. Within thirty days from date of posting the location notice, file for record in the office of County Recorder, if claim be situate without and beyond an original mining district, a substantial copy of the notice of location.

5. Where a mining district exists an original and duplicate copy of the notice of location are filed with the District Recorder, which duplicate the District Recorder sends to the County Recorder to be by him recorded.

NOTE.—The Acts of 1899, page 26, allow districts to be organized, but provide that the nearest boundary line of district shall not be within ten miles of the office of any County Recorder.

Washington.

LOCATION NOTICE.

1. Post at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator and the date of discovery.

TEN-FOOT SHAFT.

2. Within ninety days from date of discovery sink shaft ten feet deep from the lowest part of the rim. This requirement of shaft does not apply to any mining claim located west of the summit of the Cascade mountains.

STAKES. BLAZING.

3. Within ninety days mark boundaries by substantial posts or stone monuments, bearing name of lode and date of location at each corner of claim. Posts and monuments not less than three feet high; posts not less than four inches in diameter, set in the ground in a substantial manner. Brush must be cut away and trees must be blazed along lines of claim.

OPEN CUTS.

4. Any open cut or tunnel having a length of ten feet, which shall cut a lode at the depth of ten feet below the surface, shall hold such lode the same as if a discovery shaft were sunk thereon, and shall be equivalent thereto.

RECORD.

5. The discoverer of a lode shall, within ninety days from the date of discovery, record in the office of the auditor of the county in which such lode is found, a notice containing the name or names of the locators, the date of the location, the number of feet in length claimed on each side of the discovery, the general course of the lode, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.

Wyoming.

SIXTY DAYS FOR DISCOVERY SHAFT.

1. The discoverer of any mineral lode or vein in this state shall have the period of sixty days from the date of discovering such lode, or vein, in which to sink a discovery shaft thereon.—*Rev. St., Sec. 2550.*

DETAILS OF LOCATION.

2. Before the filing of a location certificate in the office of the county clerk and *ex officio* register of deeds, the discoverer of any lode, vein, or fissure, shall designate the location thereof as follows:

First—By sinking a shaft upon the discovery lode or fissure to the depth of ten feet from the lowest part of the rim of such shaft at the surface;

Second—By posting at the point of discovery, on the surface, a plain sign or notice, containing the name of the lode or claim, the name of the discoverer, and locator, and date of such discovery;

Third—By marking the surface boundaries of the claim, which shall be marked by six substantial monuments of stone or posts hewed or marked on the side or sides which face in toward the claim, and sunk in the ground, one at each corner, and one at the center of each side line.—*Rev. St. 2548.*

The claim must disclose mineral bearing rock in place.

OPEN CUTS.

3. Any open cut which shall cut the vein ten feet in length and with face ten feet in height, or any crosscut tunnel, or tunnel on the vein ten feet in length which shall cut the vein ten feet below the surface, measured from the bottom of such tunnel, shall hold such lode the same as if a discovery shaft were sunk thereon.—*Rev. St., Sec. 2549.*

LOCATION CERTIFICATE. RECORD.

4. A discoverer of any mineral lead, lode, ledge, or vein shall, within sixty days from date of discovery, cause such claim to be recorded in the office of the county clerk and *ex-officio* register of deeds of the county within which such claim may exist, by a location certificate which shall contain the following facts:

First—The name of the lode claim;

Second—The name or names of the locator or locators;

Third—The date of location;

Fourth—The length of the claim along the vein measured each way from the center of the discovery shaft and the general course of the vein, as far as it is known;

Fifth—The amount of surface ground claimed on either side of the center of the discovery shaft or discovery workings;

Sixth—A description of the claim by such designation of natural or fixed objects, or if upon ground surveyed by the United States system of land surveys, by reference to section or quarter-section corners, as shall identify the claim beyond question.—*Rev. St., Sec. 2546.*

The discovery shaft must be "always equally distant from the side lines of claim."

RECORD.

Essentials of Location Certificate.

R. S. Sec. 2324.—* * * All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * * —*Sec. 5, A. C. May 10, 1872.*

Colorado Statute—Time to File.

R. S. Colo. Sec. 4194.—The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

First—The name of the lode;

Second—The name of the locator;

Third—The date of location;

Fourth—The number of feet in length claimed on each side of the center of discovery shaft;

Fifth—The general course of the lode as near as may be.—*Feb. 13, 1874.*

Indefinite Record Void.

R. S. Colo. Sec. 4195.—Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.—*Id.*

Separate Record of Each Claim.

R. S. Colo. Sec. 4196.—No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location it shall be absolutely void, except as to the first location therein described, and if they are described together, or so that it can not be told which location is first described, the certificate shall be void as to all.—*Id.*

The Statutory Requirements Essential

to a location certificate stated in section 4194 above printed are followed by similar but not identical statutes in all the

mining States and Alaska. The statutory requirements in the several States, in addition to those above noted, are tabulated, page 68.

Where no statutory requirements other than the Federal Statute exist, a certificate following the form below given (page 90) would in any State or Territory fully comply with the requirements of the law.

The Nevada Statute requiring the distance each side of the discovery and the general course of the vein to be stated in the location certificate was held merely directory in *Zerres v. Vanina,* 134 F. 616.

So far as such Statutes require a discovery shaft of certain depth or any other item of location or record in itself material, they are only reasonable and have uniformly been held mandatory; but oppressive and trifling details, such as imposed by the 1907 mining act of Nevada, and the 1895 act of Montana (materially amended for the better in 1907) requiring "a description of each corner" and the "dimensions" of the discovery shaft, ought to be held directory only and noncompliance not fatal, as was ruled concerning the requirement that the record give the length each side of the discovery and the general course of the vein, in *Zerres v. Vanina, supra.*

The Montana act of 1895 above cited was held mandatory and the attempted compliance fatally defective in *Purdum v. Laddin,* 23 Mont. 387, 59 P. 153, and in *Hahn v. James,* 29 Mont. 1, 73 P. 965, but the description in *Walker v. Pennington,* 27 Mont. 369, 71 P. 156, and in *Butte Co. v. Radmilovich,* 39 Mont. 157, 101 P. 1078, was sustained. As to these cases see *Clark Montana Co. v. Butte Co.* as cited on p. 11.

The declaratory statement in that State need not describe the claim by metes and bounds. *Tiggeman v. Mrzlak,* 40 Mont. 19, 105 P. 77.

Necessity for Record.

It is conceded that the Federal Statute does not in terms require a record to be made.—*Southern Cross Co. v. Europa*

Co., 15 Nev. 383, 9 M. R. 513; *Haws v. Victoria Co.*, 160 U. S. 318, 40 L. Ed. 436, 16 Sup. Ct. Rep. 282. And although before the mining acts a record in some form was almost universally required, and although either in terms, or assumedly, required in every State, yet it seems that the necessity for a record must be created by Statute or District rule.

On these grounds there have been three decisions on the construction of the Nevada law, holding in terms that record was not mandatorily imposed by the mining act of that State. In *Zerres v. Vanina,* 134 F. 610, it was held that failure to record either within the time mentioned in the statute or at any time, did not avoid a discovery made complete by discovery shaft, notice and staking.

In *Ford v. Campbell,* 29 Nev. 578, 92 P. 206, the Statute is considered more fully with the holding that a record in Nevada if made at all must be with both District and County Recorder. But that the intent of the Statute was merely to give the locator the benefit of a means of making *prima facie* proof of discovery and location by production of the record and not to defeat the location for want of a record; and that the first location, having a record in only one office, and its description further being fatally defective, was nevertheless a good and permanent location without any record at all. Cited and followed in *Indiana Co. v. Gold Hills Co.* which adds that the failure to record only shifts the burden of proof. 35 Nev. 158, 126 P. 965; *Wailes v. Davies,* 158 F. 667.

Close as the question may be this construction is defensible and affords an escape from defeat of priority by failure to comply with the burdensome and almost impossible details required to show in the record, under the act construed by these decisions, and the even more indefensible act in these particulars of 1907, the wording of which on the point of necessity of record is the same as that of the old act.

It has been decided (Ross, J., dissenting) that the Alaska Act, providing for the record of mining claims within 90 days from discovery, is permissive only and failure to record does

not forfeit the claim.—*Sturtevant v. Vogel,* 167 F. 449, 93 C. C. A. 84.

The Time to Record the Location Certificate Is Fixed

by statute in Colorado within 3 months; North and South Dakota and Wyoming, 60 days; Alaska and Washington, 90 days from date of discovery.

California and Utah within 30 days after date of posting. Montana and Oregon 60 days from such date. Nevada 90 days from date of posting. New Mexico three months from such date. Arizona and Idaho within ninety days from date of "location."

For proper office or offices in which to file the location certificate, see STATUTORY REQUIREMENTS tabulated on page 68.

Where there is no organized mining district, and therefore no district recorder, the certificate should always be filed with the county recorder.

Recording Location Notice as Certificate.

It is the statutory regulation in California, Idaho, Arizona, Utah, Oregon and New Mexico, and the custom in many mining districts to make the location notice in duplicate, placing one on the claim and filing the other for record. The location certificate, or record, everywhere, must contain all that is required of the notice besides giving a full description which is not required of the notice. If, therefore, the custom be to make these instruments duplicate, each must contain what is required of the greater and both would have to contain a full description with reference to monuments, to conform to the Act of Congress. If not exact duplicates it is not fatal.—*Gird v. California Co.,* 60 F. 531, 18 M. R. 45.

Description in Location Notice.

Unless expressly required by Statute or district rule, and barring the above noted exception as to States where the record is a duplicate of the posted notice, the location notice

is not supposed to call for any tie or to contain a description of the claim.—*Poujade v. Ryan,* 21 Nev. 449, 33 P. 659; *Souter v. Maguire,* 78 Cal. 543, 21 P. 183.

Only the items specifically commanded for it to contain are material and the additional facts so often recited in such notices are harmless surplusage.

Filing for Record Is Equivalent to Record,

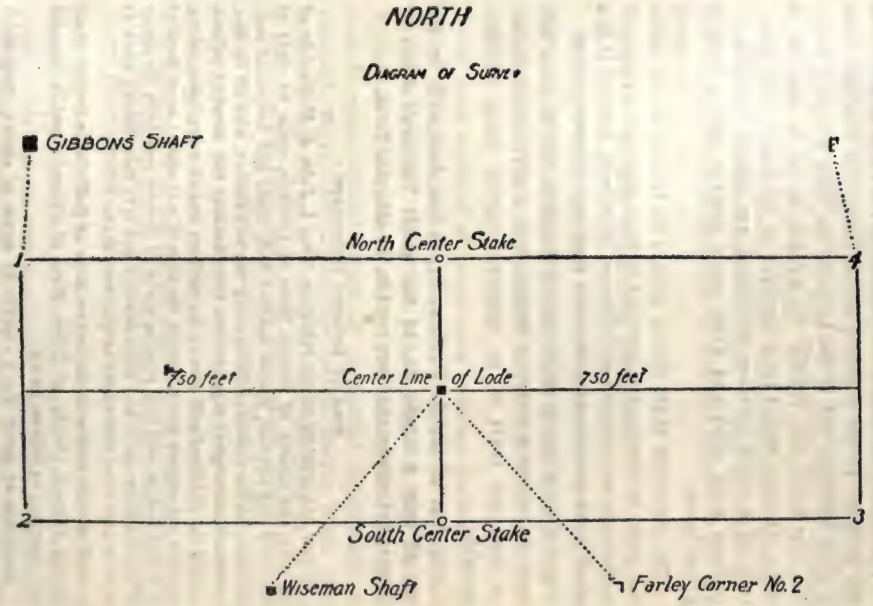
and subsequent errors or neglect of the officer can not prejudice the locator.—*Weese v. Barker,* 7 Colo. 178, 2 P. 919; *Shepard v. Murphy,* 26 Colo. 350, 58 P. 588.

The Record Follows the Location,

as the location follows the discovery. The record is a publication of the location, and is therefore called the location certificate. Many of the old forms of these certificates are not sufficiently specific and the Surveyor-General in such cases requires a new record to be made before issuing order of survey upon application for patent.

The Certificate As Proof of the Acts of Location.

See EJECTMENT, p. 443.


NORTH
DIAGRAM OF SURVEY
GIBBONS SHAFT
North Center Stake
1
4
750 feet
Center Line of Lode
750 feet
2
3
South Center Stake
Wiseman Shaft
Farley Corner No. 2

Description of Claim—Ties.

The record contains a description of the claim as staked on the ground. If not properly staked the record does not make a good location; but if the location has been properly made, the certificate can readily be written so as to describe it fully, whether staked by a surveyor or otherwise. The essentials of a valid location certificate are stated concisely in sections 4194, 4195 and 4196, above printed, and a form is given below.

The discovery shaft should always be treated as an essential point of description and tied to some near and prominent monument, with course and distance therefrom, because it is a much more permanent monument than any stake or corner.

In addition, one or more corners should be tied to other natural objects or permanent monuments, a government corner or discovery shaft of an approved survey being unobjectionable.

The text of the A. C., however, is complied with by the use of only a single tie, as the words "natural object or permanent monument" are used in the singular form.

FORM OF LOCATION CERTIFICATE.

KNOW ALL MEN BY THESE PRESENTS, That I, *John A. McMurtrie*, of the City and County of *Denver*, State of Colorado, claim by right of discovery and location, *fifteen hundred* feet, linear and horizontal measurement, on the CARDINAL LODE, along the vein thereof, with all its dips, variations and angles; together with *three hundred* feet in width on each side of the middle of said vein at the surface; and all veins, lodes, ledges, deposits and surface ground within the lines of said claim; *seven hundred and fifty* feet on said lode running *north 88 degrees east* from the center of the discovery shaft, and *seven hundred and fifty* feet running *south 88 degrees west* from said center of discovery shaft.

Said claim is situate on the *eastern slope of Bull Hill in Cripple Creek* Mining District, County of *Teller*, State of Colorado, and is bounded and described as follows, to-wit:

Beginning at corner No. 1 (northwest corner of claim), from which deep shaft of Gibbons Lode bears N. 2 degrees E. 70 feet and running thence S. 2 degrees E. 600 feet to corner No. 2; thence N. 88 degrees E. 750 feet to south-center stake; thence same course 750 feet to corner

No. 3; thence N. 2 degrees W. 600 feet to corner No. 4 (northeast corner), from which blazed pine tree 2 feet in diameter marked "F," bears N. 8 degrees W. 22 feet; thence south 88 degrees W. 750 feet to north-center stake, and thence same course 750 feet to the place of beginning.

From discovery shaft, corner No. 2, of Farley Lode, survey lot No. 787, bears S. 45 degrees E. 350 feet, and discovery shaft of Wiseman Lode bears S. 45 degrees W. 375 feet.

Date of discovery, January 3, 1916. Staked and located February 4, 1916. Date of certificate, February 5, 1916. JOHN A. MCMURTRIE.

The above form corresponds in ties and courses to the diagram on page 89.

Descriptive Defects in Location Certificate.

In addition to the cases cited on page 58, under "LOCATION," there are certain other decisions in particular requiring mention because of their tendency to condone very vague records.

The most material of these cases, because decided by the Court of highest authority, is that of *Hammer v. Garfield Co.*, 130 U. S. 291, 32 L. Ed. 964, 9 Sup. Ct. Rep. 548, 16 M. R. 125. There, the opinion, after stating that "a reference to some natural object or permanent monument" is required, says: "Of course the section means when such reference can be made." And it then proceeds to uphold a record whose only call or tie was "about fifteen hundred feet south of Vaughn's Little Jennie Mine." The opinion further treats the claim's own stakes as sufficient monuments. It was with reference to this case that HALLETT J. on objection being made in the Circuit Court to an indefinite record, overruled the objection with the observation: "The Supreme Court has repealed the Statute on this point."

In *Gamer v. Glenn*, 8 Mont. 371, 20 P. 654, a "large bowlder at the west end of the Tim lode" was the starting point. This was the only monument. Adjoiners were named, but it was proved that no such claim as the "Tim" was known or existed. The record was maintained. The test applied in this case was a fair and reasonable one in its

terms, to wit: it must be a description which would enable a person of reasonable intelligence to find the claim and trace its boundaries. Cited and followed on very similar record in *Bramlett v. Flick*, 23 Mont. 95, 57 P. 869, 871, 20 M. R. 103.

Hansen v. Fletcher, 10 Utah 266, 37 P. 480, decided in terms that the claim's own corners were sufficient monuments within the Act, treating them as a complete description without even referring to the attempted tie to another mine about a mile distant. An equally vague description was upheld on the same lines in *Credo Co. v. Highland Co.*, 95 F. 911. Both these decisions cite and follow the *Garfield case, supra; Farmington Co. v. Rhymney Co.* 20 Utah 363, 77 Am. St. Rep. 913, 58 P. 832.

The Statute requires the location to be "marked on the ground" and also a "description by reference." This means and had always been considered to mean a reference to an object or monument distinct from its own stakes or corners, but the above citations go far towards maintaining any record which bounds itself by calling from corner to corner.

In *Darger v. Le Sieur*, 8 Utah 160, 30 P. 363, and *Brown v. Levan*, 4 Ida. 794, 46 P. 661, the location certificates were held void for indefiniteness; while in *Bennett v. Harkrader*, 158 U. S. 443, 39 L. Ed. 1046, 15 Sup. Ct. Rep. 863, 18 M. R. 224, it was held that a location certificate with practically no description at all was good. This last case can not be safely depended on as a precedent to be followed, as the Court proceeded to pass finally on the law by holding that an Act of Congress of 1884, 23 Stat. L. 24, validated all claims in Alaska prior to its date without regard to form, if the claimants were in actual possession.

The record was held fatally defective for failure to state the length and width of the claim and general course of the vein, as required by Oregon statute.—*Sharkey v. Candiani*, 48 Or. 112, 7 L. R. A. (N. S.) 791, 85 P. 219. For failure to call for natural object or monument in *Mutchmor v. McCarty*, 149 Cal. 603, 87 P. 85. For failure to give dimensions of dis-

covery shaft.—*Helena Co. v. Baggaley,* 34 Mont. 464, 87 P. 455, and for failure to show that the lode was cut at a depth of ten feet below the surface in *Dolan v. Passmore,* 34 Mont. 277, 85 P. 1034. For failure to give the length each way from discovery shaft.—*Slothower v. Hunter,* 15 Wyo. 189, 88 P. 36. Descriptions calling for corner stakes without meandering the bounds were held good in *Bonanza Co. v. Golden Head Co.,* 29 Utah 159, 80 P. 736.

A description by the points of the mariner's compass was maintained in *Hayden v. Brown,* 33 Or. 221, 53 P. 490.

In *Bismark Co. v. N. Sunbeam Co.,* 14 Ida. 516, 95 P. 14, is a full review of the cases on descriptions in vague location certificates. The only description there was "situated on Bismark Mountain" with calls for its own stakes and it was held sufficient.

This precedent is cited and followed in *Flynn Co. v. Murphy,* 18 Ida. 266, 138 Am. St. Rep. 201, 109 P. 851, and the case goes fully into the details of location and record as required by the Idaho Statute.

Plaintiff's declaratory statement was held sufficient under the Montana Mining Act, but that of defendant was excluded for want of preliminary proof as to size and the setting of posts in *Giberson v. Tuolumne Co.,* 41 Mont. 396, 109 P. 974.

Where the record called for a parallelogram 1500 by 600 feet and the stakes set made an irregular quadrilateral several hundred feet short on both side and end lines the location was held void.—*Leveridge v. Hennessy,* 48 Mont. 58, 135 P. 906.

Rule of Construction.

Location certificates are of a class to which a liberal, not a technical, rule of construction will be applied and any language which will be fair notice to subsequent prospectors will make a sufficient description.—*Fissure Co. v. Old Susan Co.,* 22 Utah 438, 63 P. 587, 21 M. R. 125; *Morrison v. Regan,* 8 Ida. 291, 67 P. 955, 22 M. R. 69; *Wells v. Davis,* 22 Utah

322, 62 P. 3, 21 M. R. 1; *McCann v. McMillan,* 129 Cal. 350, 62 P. 31, 21 M. R. 6.

But where the State statute requires a description more specific than that implied from the A. C. Sec. 2324, such requirements are mandatory and a record calling only for its own corners is void.—*Purdum v. Laddin,* 23 Mont. 387, 59 P. 153; the same as to any such statutory requirements prescribing details of location.—*Copper Globe Co. v. Allman,* 23 Utah 410, 64 P. 1020, 21 M. R. 296.

Tying to Location Monument.

In Idaho there must not only be a description by reference to natural object or permanent monument, but such object must be tied both by course and distance to the monument erected at the point of discovery.—*Clear Water Co. v. San Garde,* 7 Ida. 106, 61 P. 137.

Surplusage—Misdescription.

The addition of statements not pertinent or material does not vitiate the paper.—*Preston v. Hunter,* 67 F. 996, 15 C. C. A. 148. And where there is a false course or a false tie, but after discarding the misleading clause enough remains to fully identify the claim, the record is valid. Or a mistake in course or distance may be corrected by a call for a monument or some objective point.—*Smith v. Newell,* 86 F. 56. The fact that the last call fails to close will not vitiate a location certificate otherwise regular.—*Providence Co. v. Burke,* 6 Ariz. 323, 57 P. 641, 19 M. R. 625.

The fact that failure to erase two words in a printed location certificate rendered it, if read literally, without meaning, will not invalidate the instrument.—*Green v. Gavin,* 10 Cal. App. 330, 101 P. 931. Clerical mistakes in location certificate will be disregarded.—*Clark v. Mitchell,* 35 Nev. 464, 130 P. 764, 134 P. 449.

Variance.

Where there is a variance between the record of the claim and the stakes on the ground the locator may claim according to his stakes unless a subsequent locator has been misled by such misdescription.—*Cardoner v. Stanley Co.,* 193 F. 517. And see *Swanson v. Koeninger,* 25 Ida. 361, 137 P. 891.

Parol Proof to Connect the Paper With the Thing Described —Ultimate Question of "Location Proved" for the Jury.

Where the description is uncertain by reason of latent defects—that is, where the record has sufficient calls, but the Court can not tell from inspection whether such calls are natural objects or permanent monuments—if the paper makes out a sufficient description, conditioned that they be such objects or monuments, the certificate will be admitted, leaving the jury to decide this as a question of fact.—*Upton v. Larkin,* 7 Mont. 449, 17 P. 728, 15 M. R. 404; *O'Donnell v. Glenn,* 8 Mont. 248, 19 P. 302; *Russell v. Chumasero,* 4 Mont. 309, 1 P. 713, 15 M. R. 508. The sufficiency of the location—that is, whether the facts proved show a location complying with the law as the Court gives them the law—is for the decision of the jury.—*Flavin v. Mattingly,* 8 Mont. 242, 19 P. 384; *Fissure Co. v. Old Susan Co.,* 22 Utah 438, 63 P. 587, 21 M. R. 125.

Whether certain monuments of a certain size would mark the boundaries so that they could be readily traced, is for the jury to say.—*Taylor v. Middleton,* 67 Cal. 656, 15 M. R. 284, 8 P. 594.

The claimant may by parol identify the objects called for as permanent monuments.—*Seidler v. Maxfield,* 5 N. M. 197, 20 P. 794; *Metcalf v. Prescott,* 10 Mont. 283, 25 P. 1037, 16 M. R. 137. And a government corner is a good call, although its true position was seriously disputed.—*Gird v. California Co.,* 60 F. 531, 18 M. R. 45.

A single tie to a patent corner is sufficient.—*Carlin v. Freeman,* 19 Colo. App. 334, 75 P. 26. So is a tie to a single stake. —*McIntosh v. Price,* 121 F. 716, 58 C. C. A. 136.

The description of a placer claim by its number as one of a tier of claims was held good in *Smith v. Cascaden,* 148 F. 792, 78 C. C. A. 458.

The Test of Sufficiency.

On the same line as the above case of *Gamer v. Glenn,* and stating the converse of the proposition, the party attacking the certificate may show that a person could not find the premises, taking the location certificate for a guide.—*Dillon v. Bayliss,* 11 Mont. 171, 27 P. 725; *Londonderry Co. v. United Co.,* 38 Colo. 480, 88 P. 455.

The A. C. requires the date of location to be given, but the locator is not estopped to correct a mistake in the date.—*Webb v. Carlson,* 148 Cal. 555, 113 Am. St. Rep. 305, 83 P. 998.

Contradicting.

A location certificate regular on its face may be shown by parol to be false in what it calls for.—*Dillon v. Bayliss,* 11 Mont. 171, 27 P. 725. Its recited dates may be proved not true.—*Muldoon v. Brown,* 21 Utah 121, 20 M. R. 269, 59 P. 720. The same case holds that the misdating must be pleaded. But that is not only to require a party to plead his evidence but to anticipate his adversary's case.

The locator is estopped to deny the validity of his discovery or location as against his grantee.—*Blake v. Thorne,* 2 Ariz. 347, 16 P. 270; *McCarthy v. Speed,* 12 S. D. 7, 50 L. R. A. 190, 20 M. R. 124, 80 N. W. 135.

Overlapping Stakes.

Where a fractional claim was located by stakes all set on or near the lines of the surrounding claims, the staking was upheld.—*West Granite Co. v. Granite Co.,* 7 Mont. 356, 17 P.

547. And the same where, through locating in the night, the stakes overset on the adjoiner.—*Doe v. Tyley,* 73 Cal. 21, 14 P. 375.

Immaterial Calls.

The statute does not require the certificate to state the distance from the discovery shaft to the side lines.—*Quimby v. Boyd,* 8 Colo. 194, 6 P. 462.

Wrong County.

Where the record is made in the right county but a wrong county is called for in the description the error is not fatal.—*Metcalf v. Prescott,* 10 Mont. 283, 25 P. 1037, 16 M. R. 137. Like ruling where the record failed to name county or State.—*Talmadge v. St. John,* 129 Cal. 430, 21 M. R. 13, 62 P. 79; *Carter v. Bacigalupi,* 83 Cal. 187, 23 P. 363.

Names Omitted in the Record.

R. S. Sec. 2324 requires that the record "shall contain the name or names of the locators." The location certificate was in the names of three only out of five alleged discoverers or owners. It was held that the claim was in the legal ownership of the three whose names were used whatever might be the equities of the two excluded persons.—*United States v. Ringeling,* 8 Mont. 353, 20 P. 643.

Verification.

Idaho, Montana and Oregon require the location certificate to be verified, and it has been decided that such requirement is legitimate State legislation under R. S. Sec. 2322.—*Van Buren v. McKinley,* 8 Ida. 93, 21 M. R. 690, 66 P. 936; *Wright v. Lyons,* 45 Or. 167, 77 P. 81. The rulings on the Montana Act have been severe, if not extreme.—*McCowan v. Maclay,* 16 Mont. 234, 40 P. 602; *Berg v. Koegel,* 16 Mont. 266, 40 P. 605; *Hickey v. Anaconda Co.,* 33 Mont. 46, 81 P. 806. A verification

made on information was sustained in *Mares v. Dillon*, 30 Mont. 117, 75 P. 963. But *Clark Montana Co. v. Butte Co.* seems to hold that a want of verification is not fatal and to overrule these Montana cases to the contrary.—233 F. 548.

Priority of Record Is So Generally Involved With Questions of priority of location and of continued possession that this point has in most cases less weight than is generally supposed. Record is the inception of the written title, but the actual title of a mining claim, properly followed up, reaches back to the discovery.

But if a discovery be not followed by a location and record within the time fixed by the statute, an intervening record becomes the prior title. In other words, the rights acquired by discovery are forfeited by neglect to perfect the title by location and record; and that title which if properly followed up would have dated from discovery, will, if it be not so followed up, be suspended in favor of any valid record made after the expiration of a reasonable time, or the period fixed by statute, and before any record of such prior discovery.

Or a record filed before the statutory period has expired, although based on a junior discovery, becomes the senior title the moment the time allowed to the first discovery to complete its record has elapsed without such record being consummated.

The same rule applies to any senior locator who permits the time allowed for sinking his discovery shaft to expire before he has reached the required depth and found the required crevice.

Where two locations are made by the same party on the same day, fractions of a day may be proven on the question of priority.—*Moorhead v. Erie M. & M. Co.*, 43 Colo. 408, 96 P. 253.

Possession Without Valid Location or Record.

The cases upon this point require careful examination to ascertain the distinctions made and even after such examination manifest inconsistencies appear.

One series of cases says that where a party is in actual possession no stranger can invade such possession in order to initiate an adverse title; in other words, a prospector can not go upon the claim however invalid or defective, to sink a discovery, set up a notice or plant stakes.—*Phoenix Co. v. Lawrence,* 55 Cal. 143, 12 M. R. 261; *North Noonday Co. v. Orient Co.,* 1 F. 522, 9 M. R. 529, 6. Sawy. 299; *Weese v. Barker,* 7 Colo. 178, 2 P. 919; *Craig v. Thompson,* 10 Colo. 517, 16 P. 24; *Rush v. French,* 1 Ariz. 99, 25 P. 816.

Certain of these cases hold that he may not invade the actual workings then or lately occupied.—*Faxon v. Barnard,* 2 McCr. 44, 4 F. 702, 9 M. R. 516. Others hold that he may not enter within the lines of the claim.—*Eilers v. Boatman,* 3 Utah 159, 15 M. R. 462, 2 P. 66.

Some of the above citations can be justified, within certain limits, on the principle of preserving the peace on the public domain. But their logical result, if taken without qualification, would be that a party in possession could hold by his possession alone, in disregard of all the requirements of the State Statute and of the Act of Congress.

On the other hand there are many decisions to the effect that a party, after the lapse of the statutory time to complete location and record, can not hold against a claim later in discovery but which has been the first to complete a valid location and record under the Statute—that a miner can hold his claim only by compliance with the regulations prescribed by the owner of the fee (the United States) and the State or district regulations which such owner has authorized.—*McKinstry v. Clark,* 4 Mont. 395, 1 P. 759; *Noyes v. Black,* 4 Mont. 527, 2 P. 769; *Horswell v. Ruiz,* 67 Cal. 111, 7 P. 197, 15 M. R. 488; *Garfield Co. v. Hammer,* 6 Mont. 53, 8 P. 153; *Gleeson v. Martin White Co.,* 13 Nev. 442, 9 M. R. 435; *Sweet v. Webber,* 7 Colo. 433, 4 P. 752; *Lalande v. McDonald,* 2 Ida. 283 (307), 13 P. 347; *DuPrat v. James,* 65 Cal. 555, 4 P. 562. 15 M. R. 341.

The Supreme Court of Montana said: "Such location is a condition precedent to the grant. Mere possession not based

upon a valid location would not prevent a valid location under the law."—*Belk v. Meagher*, 3 Mont. 65, 1 M. R. 534, and the decision was affirmed by the Federal Supreme Court on the same lines.—104 U. S. 279, 1 M. R. 510.

Plaintiff was the first discoverer of the Grotto Lode, which he staked and recorded, but his location work was not sufficient. Defendants entered later and made a location valid in all respects. Plaintiff returned and did work to perfect his original location. The Court held that he could not tack on such later work to impeach the intervening completed claim.—*Ferris v. McNally*, 45 Mont. 20, 121 P. 890.

Mere occupation of the public lands without going through any form of procedure to obtain title gives no vested rights against the United States or its vendees.—*Le Fevre v. Amonson*, 11 Ida. 45, 81 P. 71.

First Complete Location—One Party in Default.

The first in time to comply with all the requirements, after allowing to the one who takes the first step to initiate a title his reasonable or his statutory time to complete the same, is the first in law.

If the first discoverer fail to sink his shaft within the statutory period, or to stake or record within the time fixed by law (or within a reasonable time where there is no Statute), and a second party makes a discovery while the first party is in default, such second party has the statutory time to complete his location and record and will hold the ground against the original discoverer, although such original discoverer perfects his location and record before the location on the second discovery is complete.

We think the language of the two preceding paragraphs is justified by the language of the Supreme Court in *Lockhart v. Johnson*, 181 U. S. 527, 45 L. Ed. 979, 21 Sup. Ct. Rep. 665, and many other cases.—*Copper Co. v. Allman*, 23 Utah 410, 21 M. R. 296, 64 P. 1020; *Gregory v. Pershbaker*, 73 Cal. 109, 15 M. R. 602, 14 P. 401; *Patterson v. Hitchcock*, 3 Colo. 533,

5 M. R. 542; *Thallman v. Thomas,* 111 F. 277, 49 C. C. A. 317, 21 M. R. 573.

Entry During Discoverer's Locating Time.

The Golden Bell lode was first discovered, put up its notice, sank its shaft in due time, but did not record until the three months had expired. The Verde had made a discovery during the sixty days allowed to sink the Golden Bell shaft, making such discovery beyond the distance claimed by the Golden Bell notice. After the three months allowed to the Golden Bell had expired, and when the Golden Bell was in default but the Verde within its time, the Verde made its survey—by such survey taking up ground covered by the Golden Bell notice. The Court held that the Verde, though its discovery shaft was sunk on clear ground, was a title initiated by trespass and could not be made the basis of a claim to survey over the Golden Bell territory.—*Omar v. Soper,* 11 Colo. 380, 7 Am. St. Rep. 246, 15 M. R. 496, 18 P. 443.

The Jessie Mac posted its location notice on June 30, 1899, but failed to complete its location. The Cripple Creek posted its location notice within the feet claimed by the Jessie Mac on the fifty-ninth day thereafter. *Held:* that the first posted notice was an appropriation of ground claimed by it, and that no title could become initiate during the sixty days allowed to sink discovery, and that, therefore, the failure of the Jessie Mac to complete its location within the statutory time could not avail to make good the Cripple Creek location.—*Sierra Blanca M. Co. v. Winchell,* 35 Colo. 13, 83 P. 628.

With the doctrine that a notice is a complete appropriation of the ground so as to make the entry of a second prospector within its area a trespasser, as is held in the above citations, we can not for one moment agree, (1) because it is carrying the idea of trespass beyond the reason on which it is based; (2) because it operates unjustly against later but more diligent prospectors, and (3) because the weight of authority is against it.

1. The assertion that it is a trespass at all is not true, because there is no possession invaded.—*Nash v. McNamara*, 30 Nev. 114, 133 Am. St. Rep. 694, 16 L. R. A. (N. S.) 168, 93 P. 405.

2. It is indefensible that a mere notice of intention to locate, which intention the party stating it is not bound to make good, should bar other prospectors from the right to search for mineral on the assumption that the intention will be carried out.

The second prospector takes the chances of the notice being perfected into a complete location, and if it is he must yield to the now perfected prior right; but if the second party completes his location and the first never does, we can see no reason why it should be said that the latter has a tainted title. If these cases cited are law the party who thus failed to perfect his location could wait for years and until the first complete location had been developed into a valuable mine, then make his record and take the ground. For if a location is initiated by trespass it never ripens into a good title short at least of the period of the Statute of Limitations.

3. The exact point is discussed and decided as we claim that it should be in *Helena M. Co. v. Baggaley*, 34 Mont. 464, 87 P. 456, and in the *Nash case, supra.*

In their opinion the Supreme Court of Montana hold: That where a second discoverer enters on the ground within the area covered by a notice lately posted and within its lifetime, but the first discoverer fails to perfect his location in due time and the second does so perfect, the second party holds the ground.

No exact rule can be laid down to meet every variation in which the question could present itself, but after conceding that a man's actual occupation of his workings may not be invaded, and that a drift would amount to such actual occupation of the vein for the length of such drift upon the vein above and below; and that an adverse entry would not be allowed so near to, although not actually upon, the workings of the prior party as to threaten to provoke a breach of the

peace—it would seem that after such concessions, the first party having made no record, or no location certificate amounting to a valid record, or having otherwise failed in any essential point necessary to constitute a valid location, the ground would be open to the location and record of a valid claim thereon.—*Lockhart v. Wills*, 9 N. M. 344, 54 P. 336, 19 M. R. 497.

Record Complete Before Adverse Rights Initiated.

Notwithstanding delay to record or delay to sink discovery or to set stakes or to find a well-defined crevice or to do any other essential act of location, it has been repeatedly and in many forms held that if at length the record or location be in fact perfected before the hostile title had its inception, that the title to such delayed but finally completed location is perfect as against any later initiated title, and that the last act of location relates back to and the title begins from the original date of discovery.—*McGinnis v. Egbert*, 8 Colo. 41, 15 M. R. 329, 5 P. 652; *Preston v. Hunter*, 67 F. 996, 15 C. C. A. 148; *Nelson v. Chittenden*, 53 Colo. 30, Ann. Cas. 1914A 1198, 123 P. 656.

All Parties in Default.

In the suit between the Green Mountain and the Ontario it appeared that the Green Mountain was discovered in August, 1877, and recorded in March, 1878. The Ontario was discovered in February and recorded in July, 1878. Each had exceeded the three months allowed by law to record and the priority in title (as to this point) was given to the first discovery. It seems that it would have been otherwise if the Ontario, although a later discovery, had completed its record within the three months.—*Faxon v. Barnard*, 2 McCr. 44, 4 F. 702, 9 M. R. 515.

The Green Mountain had both first discovery and first record, but with a long interval between. During its delay a second discovery had intervened, but it also overstepped

the statutory time and so allowed the Green Mountain to secure the first record. This case was approved in *Lockhart v. Johnson,* 181 U. S. 527, 45 L. Ed. 979, 21 Sup. Ct. Rep. 665. We have always contended that where all parties are in default in completing their location and record within the statutory periods that the first record based upon a valid discovery and location becomes a perfected title and takes the ground without regard to priority of discovery.—*Copper Co. v. Allman,* 23 Utah 410, 64 P. 1020, 21 M. R. 296.

Possession During Locating Period.

The possession of the prospector during the period allowed by law to complete his location and record is protected, although he has so far no paper title.—*Erhardt v. Boaro,* 113 U. S. 527, 28 L. Ed. 1116, 5 Sup. Ct. Rep. 565, 15 M. R. 472; *Marshall v. Harney Peak Co.,* 1 S. D. 350, 47 N. W. 290. His location certificate when recorded relates back to the date of his discovery.

And no party can intrude within his lines marked out or within the ground which he has a right to cover during that period—limited to 750 feet on each end of his discovery, unless his location notice (page 37) fixes the number of feet claimed each way.—*Bramlett v. Flick,* 23 Mont. 95, 57 P. 869.

By discovery and posting notice the claimant holds a prior title only during the period allowed by the law to complete his location.—*Ferris v. McNally,* 45 Mont. 20, 121 P. 890.

Possession After Such Period Elapsed.

Possession, at all times, without regard to record, location or even the fee simple, still gives a certain title as against a mere trespasser, upon which ejectment and other actions may be maintained.—*Campbell v. Rankin,* 99 U. S. 261, 25 L. Ed. 435, 12 M. R. 257; *Hawxhurst v. Lander,* 28 Cal. 231, 12 M. R. 214; *Haws v. Victoria Co.,* 160 U. S. 303, 40 L. Ed. 436, 16 Sup. Ct. Rep. 282. Long continued possession presumes ownership.—*Risch v. Wiseman,* 36 Or. 484, 78 Am. St.

Rep. 783, 59 P. 1111, 20 M. R. 409. But, as we have already intimated, such right by possession yields place at once to right by title, when such title is offered and proved.—*Wilson v. Triumph Co.,* 19 Utah 66, 75 Am. St. Rep. 718, 56 P. 301. It requires location to give the right of possession.—*Jordan v. Duke,* 4 Ariz. 278, 36 P. 896. See "EJECTMENT."

Possession is a title only by sufferance in default of something better—it is the starting point, not the goal of title—and will not prevail against the fee simple.—*Courchaine v. Bullion Co.,* 4 Nev. 369, 12 M. R. 235; or against a title perfected under the district rules.—*English v. Johnson,* 17 Cal. 107, 76 Am. Dec. 574, 12 M. R. 202; or against a complete location and record made in compliance with the law.—*Sears v. Taylor,* 4 Colo. 38, 5 M. R. 318. Where neither party perfects a valid location the first in possession has the better right.—*Neuebaumer v. Woodman,* 89 Cal. 310, 26 P. 900; *Protective Co. v. Forest City Co.,* 51 Wash. 643, 99 P. 1033.

Where a placer locator has no discovery he has no actual *bona fide* possession and the ground is open to peaceable entry by others.—*Miller v. Chrisman,* 140 Cal. 440, 98 Am. St. Rep. 63, 73 P. 1083.

Temporary suspension of work to procure tools and supplies is no break in a prospector's possession, which is a right to be protected, although no discovery has yet been made.—*Hanson v. Craig,* 161 F. 861, 89 C. C. A. 55.

After location is completed the locator is not bound to remain in actual possession.—*Holdt v. Hazard,* 10 Cal. App. 440, 102 P. 549.

Trespass—Force—Fraud.

No right can be initiated on government land by force, fraud or clandestine entry upon the actual possession of another, whether the location of such other be valid or invalid. —*Nevada Co. v. Home Co.,* 98 F. 674, 20 M. R. 283. Title to a mining claim can not be initiated by an entry upon a prior valid existing location.—*Kirk v. Meldrum,* 28 Colo. 453, 21

M. R. 393, 65 P. 634. But the possession of the first occupant, where he has no valid location, does not prevent an entry by a later party intending to make a location.—*Thallmann v. Thomas,* 111 F. 277; *Walsh v. Henry,* 38 Colo. 393, 88 P. 449.

Where parties were in possession of part of a claim, not the owners, but apparently strangers to the title, the rule as to initiation of a claim by trespass does not apply.—*Riverside Co. v. Hardwick,* 16 N. M. 479, 120 P. 325.

A pretended relocation by marking the stakes of the first locator and adopting his lines in the certificate, the first locator being in no default, is void.—*Moffatt v. Blue River Co.,* 33 Colo. 142, 80 P. 139.

Where a party sold claim to plaintiff and later was hired by defendant to locate a claim, which he did, covering the same ground he had sold, there was no privity between himself and his employer, the defendant, to estop defendant from holding the ground so located.—*Whiting v. Straup,* 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 P. 849.

Defendants bribed a prospector under grub stake contract to allow discovery to lapse by failure to complete the location and they were ruled to hold the claim they had located as trustees for the outfitter.—*Lockhart v. Washington M. Co.,* 16 N. M. 223, 117 P. 834.

Defective Record Aided by Possession.

In *Eaton v. Norris,* 131 Cal. 561, 63 P. 856, 21 M. R. 205, the Court considered both the fact of continued possession and the fact that the intruders had admitted knowledge of the prior claim—as matters of evidence to aid the older title. These *dicta* were wholly unnecessary to the decision, as the prior locators had substantial proof of location without these incidents. In *Talmadge v. St. John,* 129 Cal. 430, 62 P. 79, 21 M. R. 13, a description calling only for its own corners was held valid by the aid of such possession. But in *Brown v. Oregon Co.,* 110 F. 728, 21 M. R. 485, it is held in terms that if the prior location is not valid the later comer may locate, although he had full notice of the prior asserted claim.

In general terms, the first who complies with the law in completing his location is the first in right and this complaisant recognition of priority on the ground, and of void notices, as tending to raise a supposed equity, is simply judicial weakness, leading only to uncertainty and injustice. The *Oregon Co. case* boldly states the law as it should be stated. As between two prospectors, the fact that one is the first comer or the fact that the second knew that the first was on the ground before him, does not weaken the rights of the second comer if he be the first to comply with the law—the common protector of the rights of both.

The extent of the indulgence legally to be allowed to the prior locator is to view his evidence "in the most favorable light such evidence will reasonably justify."—*Ambergris M. Co. v. Day,* 12 Ida. 108, 85 P. 110.

Extensions.

The paragraph from section 2320, quoted on page 22 of itself disposes of all "extensions" and side claims, unless they be of themselves, howsoever named, independent discoveries and locations. "Extension" is a word often added to the name proper of a location staked off to the right or left of some developed vein, suggestive of the hope, if not the fact, that the new location is planted on the same ore body on its strike.

Lode Location Held Good As Placer.

Where a party has located a claim, not describing it as a lode, but of the length and width of a lode claim upon a deposit usually classed as placer, the Court held that placers and lodes are taken up by substantially the same procedure and that if what was done made it a valid mining location it would be sustained as a placer.—*McCann v. McMillan,* 129 Cal. 350, 62 P. 31, 21 M. R. 6. But a placer location on a metallic vein was held void in *Buffalo Co. v. Crump,* 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 22 M. R. 276.

ABANDONMENT.

District and Territorial Regulations.

The district regulations in early years often declared what acts or omissions should amount to an abandonment. Failure to represent or work for a single season or even for a very limited period was usually sufficient cause. As a camp became more or less deserted the miners about to leave frequently met and passed resolutions to the other extreme—that all claims should remain valid without any work or representation.

Where the district organizations are still preserved a rule covering or attempting to cover this point may remain valid and enforceable except that a rule requiring less than $100 annual labor would be an infringement upon the Congressional Act.—*Original Co. v. Winthrop Co.,* 60 Cal. 631; *Northmore v. Simmons,* 97 F. 386, 38 C. C. A. 211, 20 M. R. 128.

The legislatures have not attempted the dangerous matter of defining in terms what amounts to abandonment. The circumstances surrounding each particular case vary too much to make a sweeping rule in all instances fair.

Confined to Possessory Titles—Associated With Annual Labor.

Although the title to mining claims has been at all times of that class which might be lost by abandonment (*Ferris v. Coover,* 10 Cal. 631), and although a technical abandonment may at this day be proved as to any sort of possessory title, the subject has lost much of its importance except in connection with the annual labor acts.

Abandonment Is a Question of Fact,

and the fact is to be found from the intention.—*Myers v. Spooner,* 55 Cal. 257, 9 M. R. 519; *Taylor v. Middleton,* 67 Cal. 656, 8 P. 594, 15 M. R. 284; *Mallett v. Uncle Sam Co.,* 1 Nev. 188, 90 Am. Dec. 484, 1 M. R. 17; *Oreamuno v. Uncle*

Sam Co., 1 Nev. 215, 1 M. R. 32; *Marshall v. Harney Peak Co.*, 1 S. D. 350, 47 N. W. 290. It is a question of fact for the jury.—*Aye v. Philadelphia Co.*, 193 Pa. St. 451, 74 Am. St. Rep. 696, 20 M. R. 177, 44 Atl. 555. Desertion and abandonment are equivalent terms.—*Derry v. Ross*, 5 Colo. 295, 1 M. R. 1.

Abandonment being thus a matter of intention, it follows that even after doing his work if the miner should deliberately quit his claim with expression of his intention to never return to it, or give permission to others to occupy it as their own, such manifest proof of intent would establish abandonment; but in most cases the failure to do the annual labor is the fact upon which the issue is predicated and the law of annual labor involves no question of intent.—*Depuy v. Williams*, 5 M. R. 251, 26 Cal. 310; *Doherty v. Morris*, 11 Colo. 12, 16 P. 911; *Street v. Delta Co.*, 42 Mont. 371, 112 P. 702.

There must be a concurrence of intention to abandon and actual relinquishment of the property.—*Peachy v. Frisco M. Co.*, 204 F. 659.

Ceasing to work because ore not salable is no abandonment. —*Hosford v. Metcalf*, 113 Iowa 240, 84 N. W. 1054.

In *McCann v. McMillan*, 129 Cal. 350, 62 P. 31, 21 M. R. 6, the owner of a claim, on the last day but one for doing his annual labor proclaimed the claim abandoned and at once went through the form of relocating it in the name of a third party. On the first day of January it was relocated by the plaintiffs. The Court held that the pretended relocation of December 30 was void because there was in fact no abandonment. The decision was clearly right because the whole affair was a collusive proceeding; the defendant did not intend to abandon but to hold in the name of a friend. But if a third party not in collusion with the first owner had located on December 31 it could have been readily held that the abandonment was complete although the friendly relocation attempted in connection with it was void.

A father failed to do the work in 1890. His son relocated in 1891 and afterwards conveyed to the father. The location

of 1891 was defective. In a suit by the owner of a later location, *Held:* that defendant, the father, could not recall his abandonment and rely on his original title.—*Niles v. Kennan,* 27 Colo. 502, 62 P. 360, 21 M. R. 33.

A relocator may explain inadvertent recital of abandonment in his certificate.—*Peachy v. Frisco Co.,* 204 F. 659.

Abandonment and Forfeiture Distinguished.

These two terms are often used indiscriminately, but there is a clear distinction between them. Abandonment is the act and forfeiture is the consequence. It requires only one party to abandon; it requires at least two parties to work a forfeiture. If the owner of a claim quits work and leaves the country, intending never to return, leaving no agent to represent his property, it would be a typical case of abandonment. But if at a later period he returns and resumes work his title would not have been lost—he would not be required to relocate—if no second party had in the meantime attempted to locate the claim. There has been in such case an abandonment but no forfeiture, and no second party having acquired rights, the intent to abandon becomes a mere matter of sentiment.—*National M. Co. v. Piccolo,* 54 Wash. 617, 104 P. 128; *Florence Rae Co. v. Kimbel,* 85 Wash. 162, 147 P. 881; *Bingham Co. v. Ute Co.,* 181 F. 748; *Shank v. Holmes,* 15 Ariz. 229, 137 P. 871; *Co-operative Co. v. Law,* 65 Or. 250, 132 P. 521.

On the other hand the intention to abandon becomes immaterial in two classes of cases where it may be said there has been no abandonment, but there is a forfeiture:

1. Where a lessee is under covenant, or an owner is under a legal duty to do a certain thing; if he neglects to do it his rights are forfeited without regard to his intention as soon as the lessor elects to declare the forfeiture, or in the case of an unpatented mining claim when a second party makes his relocation.—*Parish Fork Co. v. Bridgewater Co.,* 51 W. Va. 583, 59 L. R. A. 566, 42 S. E. 655, 22 M. R. 145; *McKay v. Mc-*

Dougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 P. 669; *Phillips v. Hamilton,* 17 Wyo. 41, 95 P. 846.

2. Where the conduct of the party is such that abandonment is a necessary conclusion notwithstanding the want, or a party's denial, of his intention.—*Trevaskis v. Peard,* 111 Cal. 599, 18 M. R. 353, 44 P. 246; *N. A. Expl. Co. v. Adams,* 104 F. 404, 45 C. C. A. 185, 21 M. R. 65.

It requires affirmative action by the lessor to enforce a forfeiture.—*Kansas N. G. Co. v. Harris,* 79 Kan. 167, 100 P. 72.

Quitting to Lure.

Such a thing as a conditional abandonment can not be recognized. Where the owner allows strangers to hold a claim under color of title, standing by and intending to resume work only in case its development shows pay, his action amounts to abandonment.—*Trevaskis v. Peard, supra.*

How Proved.

Lapse of time, though not conclusive, is an incident tending to prove abandonment.—*Mallett v. Uncle Sam Co.,* 1 Nev. 188, 80 Am. Dec. 484, 1 M. R. 17; *Beaver Co. v. St. Vrain Co.,* 6 Colo. App. 130, 40 P. 1066. Leaving tools in the mine tends to disprove it.—*Harkness v. Burton,* 39 Iowa 101, 9 M. R. 318. Proof that a stranger had relocated ground as abandoned does not prove that it was in such condition.—*McGinnis v. Egbert,* 8 Colo. 41, 15 M. R. 329, 5 P. 652.

Where the owners of a three-fourths interest in a claim permitted J. to enter and relocate it as a new claim, this was an abandonment as to such three-fourths interest, but did not bind the owner of the remaining fourth. But such owner subsequently assenting, the abandonment became complete and the new location was not to be considered as a claim initiated by trespass.—*Conn v. Oberto,* 32 Colo. 313, 76 P. 369; *Oberto v. Smith,* 37 Colo. 21, 86 P. 86.

Of Prospect Before Record.

Where a discoverer by conduct shows an intent to quit and not perfect his location begun, the claim is abandoned and strangers need not await the expiration of the prospector's time before locating.—*Kinney v. Fleming,* 6 Ariz. 263, 56 P. 723, 20 M. R. 13.

In *Spokane Co. v. Larson,* the Court held certain alleged placer locations to have been unperfected and merely speculative and allowed proof of expenditures made by the defendant after the suit was begun in aid of its plea of abandonment by plaintiffs.—71 Wash. 301, 128 P. 641.

Ditches and Water.

Failure to use water and allowing ditch to go to decay are evidence tending to prove abandonment.—*Dorr v. Hammond,* 7 Colo. 79, 1 P. 693; *Sieber v. Frink,* 7 Colo. 149, 2 P. 901. But non-user alone does not of itself necessarily imply abandonment.—*Welch v. Garrett,* 5 Ida. 639, 51 P. 405, 19 M. R. 193; *Integral Co. v. Altoona Co.,* 75 F. 379, 21 C. C. A. 409; *N. A. Co. v. Adams,* 104 F. 404, 45 C. C. A. 185, 21 M. R. 65. A ditch may be abandoned without the abandonment of the owner's water rights.—*Nichols v. McIntosh,* 19 Colo. 22, 34 P. 278; *Wood v. Etiwanda Co.,* 147 Cal. 228, 81 P. 512.

Other Subjects of Abandonment.

A leasehold interest, water, slag and tailings are things which may be lost by abandonment.—*Glasgow v. Chartiers Co.,* 152 Pa. St. 48, 25 Atl. 232, 17 M. R. 523; *Barker v. Dale,* 3 Pgh. 190, Fed. Cas. No. 988, 8 M. R. 597; *McGoon v. Ankeny,* 11 Ill. 558, 1 M..R. 9; *Porter v. Noyes,* 47 Mich. 55, 10 N. W. 77. A prospecting contract may be abandoned.—*Chadbourne v. Davis,* 9 Colo. 581, 13 P. 721, 15 M. R. 620; *McLaughlin v. Thompson,* 2 Colo. App. 135, 29 P. 816. And failure to supply his outfit to the prospector will justify abandonment by the prospector.—*Murley v. Ennis,* 2 Colo. 300, 12 M. R. 360.

All improvements found on abandoned claims belong to the relocator.—*Wolfskill v. Smith,* 5 Cal. App. 175, 89 P. 1001.

Pleading.

There has been no consistency in the rulings as to whether abandonment necessitates a special plea. California has uniformly held that it does not.—*Willson v. Cleaveland,* 30 Cal. 192; *Bell v. Bed Rock Co.,* 1 M. R. 45, 36 Cal. 214; *Contreras v. Merck,* 131 Cal. 211, 63 P. 336; *Trevaskis v. Peard, supra.* But the current of authority elsewhere seems to require such plea.—*Hector Co. v. Valley View Co.,* 28 Colo. 315, 64 P. 205; *Bishop v. Baisley,* 28 Or. 119, 41 P. 936; *Renshaw v. Switzer,* 6 Mont. 464, 13 P. 127; *Cache Creek Co. v. Brahenberg,* 217 F. 240, 133 C. C. A. 234.

Whether pleaded or not the decisions are uniform that when relied on the party asserting it has the burden of proof. —*Johnson v. Young,* 18 Colo. 625, 34 P. 173; *Nichols v. McIntosh,* 19 Colo. 22, 34 P. 278; *Hammer v. Garfield Co.,* 130 U. S. 291, 32 L. Ed. 964, 9 Sup. Ct. Rep. 548, 16 M. R. 125. And it must be strictly proved.—*Mt. Diablo Co. v. Callison,* 5 Sawy. 439, Fed. Cas. No. 9886; *Colman v. Clements,* 5 M. R. 247, 23 Cal. 245.

But in *Duncan v. Eagle Rock Co.,* 48 Colo. 569, 111 P. 588, an adverse claim suit, where a junior location overlapped a senior claim (which is a relocation to the extent of the ground covered by the overlap), the Court held that the senior lode must prove that its annual labor had been done for the year preceding the date of the location of the later claimant.

In *Harper v. Hill,* 159 Cal. 250, 113 P. 163, the abandonment and forfeiture of a claim not mentioned in the pleadings were allowed to be proved.

As to pleading and proof in adverse claim cases, see p. 620.

Outstanding Abandoned Title.

The fact that there may have been locations now abandoned and not claimed by either party renders such outstanding titles of no relevancy to the rights of either.—*Craig v. Thompson,* 10 Colo. 517, 16 P. 24.

ANNUAL LABOR.

Annual Expenditure.

R. S. Sec. 2324. * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the *tenth day of June,* eighteen hundred and seventy-four,* and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * * *—Sec. 5 A. C. May 10, 1872.*

Amendment of 1880, Adopting the Calendar Year.

Sec. 2.—That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: *"Provided,* That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."*—Jan. 22, 1880.*

Alaska Act of 1907.

That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. * * *

* * * And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. * * * *34 St. L. 1243, Comp. L. 1913, Sec. 162.*

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*June 10, 1874, should read January 1, 1875. The time was first extended to June 10, 1874, 17 Stat. L. 483, and later to January 1, 1875, 18 Stat. L. 61.

Annual Labor Was Not Required by either Legislative or Congressional law before the passage of the A. C. May 10, 1872.

Often Required by District Rules.

By some of these rules a man was bound to do some work upon his claim every week, or every month, but these rules in most sections had fallen into disuse at the time of the passage of the Act referred to. Their provisions both as to amount required and the period in which to perform are superseded by the terms of the Congressional Act.

The idea of annual or periodical labor is not new; it was a part of the Spanish system, and generally prevailed on the Pacific Slope.

The A. C. May 10, 1872, divided lodes into two classes with respect to labor:

1. Lodes located before its passage.
2. Lodes located after its passage.

Claims Located Before May 10, 1872.

The amount of labor required on all such lodes was $10 for each hundred feet, but where claims were held in common, the whole amount of work might be done on one claim. The time for the first work on old lodes was originally fixed to expire May 10, 1873, *i. e.,* one year after the passage of the act. It was further extended to June 10, 1874, and finally postponed to January 1, 1875.—*Thompson v. Jacobs,* 3 Utah 246, 2 P. 714.

The Act of 1880 made no change either in the amount or time of annual labor on old claims. It has always been and still is $10 for each 100 feet during each year of our Lord, beginning January 1, 1875; and the time between May 10, 1872, and January 1, 1875, constituted the period for the first required labor.

But few claims remain subject to this law. During the lapse of time, now more than forty years, they have been

either abandoned or passed on to patent, or have been relocated. When so relocated they are governed by the terms of the next subdivision.

Claims Located Since May 10, 1872.

The various extensions of time for work on old lodes did not apply to the new lodes. The period for the first work was never extended, nor has any change been made except the Act of 1880. Under the original Act the annual period for labor on claims located after its date, May 10, 1872, began on the *date of location,* and this date was hard to fix with exactness. It might have been any date, intermediate between discovery and record. The Act of 1880 makes the annual period now coincide with that fixed for old claims, to-wit: each calendar year.

Each Claim an Entirety—Work on Subdivided Claim.

The 1,500-foot lodes being single claims of that length and a certain amount of work being required upon the *claim,* and the clause as to "each 100 feet in length along the vein" not applying to these new locations, it does not seem that a party, by expending any portion of the full amount, can save any fractional portion of his lode. But if a party own a segregated portion of such claim: Is he required to do the full amount essential to hold a claim, in case the other owners refuse to contribute?

It seems he is under this necessity, and each interested party must see for himself that the amount required to hold the claim is done by some person, and if the whole burden falls upon one party, the rest of the claim becomes forfeit to such party. There is no distinction made between those who own separate feet and those who own undivided interests in the claim.

The word "co-owners," used in the Act, does not appear to be used in its ordinary acceptation, as tenants in common, but to include all the owners, either in common or after they have

segregated their interests; the claim seems to be treated as an individual item so far as the relations between the government and the miner are concerned; if, therefore, all the labor is performed by the owner of the east end he may claim forfeit of the west end; or if it is all performed by the owner of an undivided half, he is in position to become the sole owner by proper notice under the forfeiture clause upon refusal of the other co-tenant to contribute his proportion. But this is only the *apparent reading* of the Act as to claims which have been segregated into several parts, and would give a benefit to a party who had no more connection with the other end of the claim than a mere stranger. Consequently this can only be treated as a suggestion of the true construction of an Act which is so worded as to be entirely ambiguous on this point.

The above paragraph is from the fifth edition of this book in 1881, but we have seen no decision nor found any reason to since change it as the true construction of the Act.

$500 Work Already Done.

The fact that sufficient improvement ($500 worth) has been done to authorize issuance of patent, does not dispense with the necessity for the annual expenditure.

Annual labor is required, although the claimant has been in possession for more than the statutory period.—*Upton v. Santa Rita Co.*, 14 N. M. 96, 89 P. 275.

Pending Application for Patent, until Entry, the Work Must be kept up.—*South End Co. v. Tinney*, 22 Nev. 19, 35 P. 89. Where an applicant after publication delays entry and neglects his annual labor the ground is open to relocation.—*Gillis v. Downey*, 85 F. 483, 29 C. C. A. 286, 19 M. R. 253.

The relocator's title in such case being necessarily too late to be protected by adverse claim, it may be asserted by suit.—*Poore v. Kaufman*, 44 Mont. 248, 119 P. 785.

Annual Labor After Entry.

It has been decided that annual labor can not be required after entry in the Land Office, although the patent has not yet been formally issued; and such decision is clearly correct, because the patent, when it issues, relates back to the date of entry, and so satisfies the wording of the Act, which requires the annual labor each year "until patented."—*Alta Co. v. Benson Co.*, 2 Ariz. 362, 16 P. 565; *Aurora Hill Co. v. 85 Co.*, 34 F. 515, 12 Sawy. 355, 15 M. R. 581, L. O. Reg. 14, 26 L. D. 196, 27 *Id.* 396. A relocation can not be made on entered lands as long as the entry stands.—*Neilson v. Champaigne Co.*, 111 F. 655, 21 M. R. 664; *Benson Co. v. Alta Co.*, 145 U. S. 428, 36 L. Ed. 762, 12 Sup. Ct. Rep. 877, 17 M. R. 488; *Southern Cross Co. v. Sexton*, 147 Cal. 758, 82 P. 423.

While the entry stands on the Land Office books, the land is withdrawn from the Public Domain even if cause for cancellation exists and cancellation later is allowed. Such is the clear ruling in *Batterton v. Douglas M. Co.*, 20 Ida. 760, 38 L. R. A. (N. S.) 1121, 120 P. 827.

On the facts of the case, an entry having been made, the annual labor then neglected, followed by a relocation by a new party, such relocation was held void, although the entry was later set aside for short posting.

It cites *Murray v. Polglase*, 23 Mont. 401, 59 P. 440, 20 M. R. 296, where the receiver's receipt having been set aside for fraud, such a relocation was held valid. It says there may be a distinction between the cases on such ground of fraud, but attacks the principle on which the Murray case was decided. In line with the Murray case are: *Shanks v. Holmes*, 15 Ariz. 246, 137 P. 871; *Swigart v. Walker*, 49 Kan. 100, 30 P. 162.

But it would seem that the case of *Brown v. Gurney*, 201 U. S. 184, 50 L. Ed. 717, 26 Sup. Ct. Rep. 509, makes good the rule quoted from the Batterton case and overrules the other decisions above cited, the conclusion being that a relocation can not be made while the entry stands or until the

old locator does some act which amounts to abandonment of his title from which act a cancellation of his entry necessarily follows. 3 Lindley, 3d ed., sec. 772.

Time During Which Labor Must Be Completed.

On all lodes located before or since May 10, 1872, the year for doing the labor is each *year of our Lord,* beginning January 1st and ending December 31st.

The Location Year.

Since the Act of 1880 no annual labor is required during the year in which the location is made.—*Hall v. Hale,* 8 Colo. 351, 8 P. 580; *McGinnis v. Egbert,* 15 M. R. 329, 8 Colo. 41, 5 P. 652. Its language is that the period "shall commence on the first day of January succeeding the date of location."

But a district rule or Statute may impose conditions which imply expenditure during the location year.—*Northmore v. Simmons,* 97 F. 387, 38 C. C. A. 211, 20 M. R. 128.

The annual labor period does not begin until discovery and location are completed.—*Borgwardt v. McKittrick Oil Co.,* 164 Cal. 650, 130 P. 417.

The Date of Location.

If a discovery be made in the latter part of the year but the staking and record are not completed until some time in the early part of the following year, the latter year would be, in our opinion, the location year, and there could be no forfeiture for neglect to do the annual labor during that year; but we find no case where the point has been in terms decided. A location is not complete until all its several parts have been perfected.—*McKay v. McDougall,* 25 Mont. 258, 87 Am. St. Rep. 395, 64 P. 669; *Hickey v. Anaconda Co.,* 33 Mont. 46, 81 P. 806, 811.

But the word "location" is used with extreme looseness in many statutes. In Nevada the discoverer is required to post

a notice "at the time and point of discovery" which must contain the date of location so that practically the date of discovery is made the date of location.

The Statutes of Idaho, Utah, Oregon and Washington seem to fix the date of posting or at least the date of some early act in the process of location as the date of location.

In New Mexico the case of *Deeny v. Mineral Creek Co.*, 11 N. M. 279, 291, 67 P. 724, 22 M. R. 47, construes the local Statute to the same effect.

In Arizona by Stats. Secs. 3232, 3234, the date of posting the discovery monument seems to be made the date of location and the sinking of the shaft and setting the boundaries are only declaratory of the fact of location.

The Montana Statute in terms says that the date of location "shall be the date of posting such notice."

In the absence of any such Statute the date of the last act to be done on the ground seems obviously to be the date of location. It can not include the date of record because the record under the Act of Congress must give the date of location, which, to be so given, must necessarily be precedent to the paper reciting it, except of course that the record might be made on the same date that the last act was performed on the ground.

Each Annual Period An Entirety.

The owner has the whole of each year to do his $100 worth of work or make his $100 worth of improvements.—*Belk v. Meagher*, 3 Mont. 65, 1 M. R. 522; *Atkins v. Hendree*, 1 Ida. 107, 2 M. R. 328; *Mills v. Fletcher*, 100 Cal. 142, 34 P. 637, 17 M. R. 671.

It therefore follows that if, for instance, he has expended $100 during the first month of the first year he may wait until the twelfth month of the second year before he does his second year's work. That such is the law admits of no doubt upon the reading of the Act. At the same time the disposition to take advantage of this fact leads to delays which

often ultimate in allowing the whole time to pass by and the claim to become liable to relocation.

Who May Perform.

Work done by any party in privity of title with the owner *(Godfrey v. Faust,* 101 N. W. 718, 105 N. W. 460), and even work gratuitously contributed, will count.—*Anderson v. Caughey,* 3 Cal. App. 22, 84 P. 223.

By Statute in New Mexico any lien holder may do the work to protect his incumbrance.—*McVeigh v. Veig,* 16 N. M. 453, 117 P. 857. And we have no doubt that such work would avail without the aid of any Statute. A stockholder may perform the annual labor.—*Musser v. Fitting,* 26 Cal. App. 746, 148 P. 536.

What Counts for Improvements.

Any work done for the purpose of discovering minerals is improvements within the spirit of the statute.—*U. S. v. Iron-Silver Co.,* 24 F. 568. Road building counted as annual labor. —*Doherty v. Morris,* 17 Colo. 105, 28 P. 85; *Mt. Diablo Co. v. Callison,* 5 Sawy. 439, 9 M. R. 616, Fed. Cas. No. 9886; *Sexton v. Washington Co.,* 55 Wash. 380, 104 P. 614. Flumes, drains or the turning of a stream or the sinking of a common shaft will count.—*St. Louis Co. v. Kemp,* 104 U. S. 636, 26 L. Ed. 875, 11 M. R. 692.

The value of rails laid, powder, fuse, candles, the value of meals furnished and the reasonable compensation for use of tools are to be considered.—*Fredricks v. Klauser,* 52 Ore. 110, 96 P. 679.

Work done for railroad company in association with mining company held for benefit of located claims.—*Florence-Rae Co. v. Kimbel,* 85 Wash. 162, 147 P. 881.

In estimating the value of work done by hydraulic pipe the value of the use of the entire system is to be considered. —*Anderson v. Robinson,* 63 Ore. 228, 126 P. 988, 127 P. 546.

Watchman.

Where a mine is idle, the time and labor of a watchman or custodian may be treated as annual labor.—*Lockhart v. Rollins,* 2 Ida. 540, 21 P. 413, 16 M. R. 16; *Altoona Co. v. Integral Co.,* 114 Cal. 100, 45 P. 1047; *Tripp v. Dunphy,* 28 L. D. 14. Pay of watchman allowed where there is portable property needing protection.—*Kinsley v. New Vulture Co.,* 11 Ariz. 66, 90 P. 438. Otherwise where there is no such property.—*Gear v. Ford,* 4 Cal. App. 556, 88 P. 600; *Fredricks v. Klauser, supra.*

The wages of a watchman may be counted when needed while mine temporarily idle, but the salary of a superintendent as a mere keeper can not be allowed to go on indefinitely as a substitute for annual labor.—*Merchants Bank v. McKeown,* 60 Or. 325, 119 P. 334.

What Will Not Count.

A house for the use of the miners built 200 feet away from the claim can not be considered as annual labor.—*Remmington v. Baudit,* 6 Mont. 138, 9 P. 819.

The expense of taking timbers, lumber, bucket, rope and tools to the mine—all carried away after slight use, if used at all—will not avail for annual labor.—*Honaker v. Martin,* 11 Mont. 91, 27 P. 397, 17 M. R. 404.

Material taken to a claim but not used does not count, nor the price paid for working animals, nor the cost of tools and boarding outfit.—*Fredricks v. Klauser, supra.*

Cutting firewood and pasturing do not count.—*Richen v. Davis,* 76 Or. 311, 148 P. 1130. Wages of cook and woodchopper disallowed.—*Merchants Bank v. McKeown,* 60 Or. 325, 119 P. 334.

Dumping tailings on a claim is no improvement.—*Jackson v. Roby,* 109 U. S. 440, 27 L. Ed. 990, 3 Sup. Ct. Rep. 301. Traveling and expenses in getting ready to go to work can not be considered.—*McGarrity v. Byington,* 12 Cal. 426, 2 M. R.

311; *DuPrat v. James,* 65 Cal. 555, 4 P. 562, 15 M. R. 341. Nor work done by third parties and bought in.—*Little Gunnell Co. v. Kimber,* Fed. Cas. No. 8402, 1 M. R. 536. But see *post,* p. 594.

Taking specimens for assays will not count for annual labor nor as a legitimate resumption of work.—*Bishop v. Baisley,* 28 Or. 119, 41 P. 936. The cost of sharpening tools may or may not be a legitimate item, according to circumstances.—*Hirschler v. McKendricks,* 16 Mont. 211, 40 P. 290.

Work Done Outside of Claim or on Group.

Work done beyond the lines will count when it has direct reference to the drainage or development of the claim.—*Packer v. Heaton,* 9 Cal. 569, 4 M. R. 447; *Kramer v. Settle,* 1 Ida. 485, 9 M. R. 561; *Mt. Diablo Co. v. Callison,* 5 Sawy. 439, Fed. Cas. No. 9886, 9 M. R. 616; *Klopenstine v. Hays,* 20 Utah 45, 57 P. 712; 17 L. D. 190. Whether the work done on one is really for the benefit of the group is for the jury to say.—*Wilson v. Triumph Co.,* 19 Utah 66, 75 Am. St. Rep. 718, 56 P. 300; *Yreka Co. v. Knight,* 133 Cal. 544, 65 P. 1092, 21 M. R. 478. Where sundry claims are worked together as one group, the development work though confined to a single claim, may count for all.—*Chambers v. Harrington,* 111 U. S. 350, 28 L. Ed. 452, 4 Sup. Ct. Rep. 428; *Jupiter Co. v. Bodie Co.,* 11 F. 666, 4 M. R. 413, 7 Sawy. 96; *St. Louis Co. v. Kemp,* 104 U. S. 636, 26 L. Ed. 875, 11 M. R. 692; *DeNoon v. Morrison,* 83 Cal. 163, 23 P. 374, 16 M. R. 33, 23 L. D. 267.

Contiguous Claims.

There are several cases which hold that the claims must be contiguous in order that work done on one may count for another.—*Gird v. California Oil Co.,* 60 F. 531, 18 M. R. 45; *Royston v. Miller,* 76 F. 50, 18 M. R. 418; *Fredricks v. Klauser, supra.* But *Altoona Co. v. Integral Co.,* 18 M. R. 410, 114 Cal. 100, 45 P. 1047, is to the contrary and there is nothing in the wording of the Congressional Act which compels them to be

contiguous except in the case of oil placers. In *Chambers v. Harrington, supra,* the opinion assumes that they must be contiguous.

In *Morgan v. Myers,* 159 Cal. 187, 113 P. 153, the claims were apparently not contiguous and further were separated by a ravine so that work on one could not benefit the other. The court held that work on one could not be counted for both.

Claims which merely corner on each other are not contiguous. —*Anvil Co. v. Code,* 182 F. 205, 105 C. C. A. 45.

Burden of Proof Shifts.

The work may be done on an adjoining patented claim but when done on any kind of claim outside the bounds of the claim intended to be protected, the burden of proof is on the party asserting that it was for the benefit of such claim and was done as annual labor for the protection of such claim.—*Hall v. Kearny,* 18 Colo. 505, 33 P. 373, 17 M. R. 594; *Sherlock v. Leighton,* 9 Wyo. 297, 63 P. 580, 934; *Copper Mt. Co. v. Butte Co.,* 39 Mont. 487, 133 Am. St. Rep. 595, 104 P. 540; *Fredricks v. Klauser,* 52 Or. 110, 96 P. 679; *Merchants Bank v. McKeown,* 60 Or. 325, 119 P. 334.

The Question of "Benefit to the Claim" Can Only Arise When

the work itself was done on some one claim and it is sought to utilize it for the benefit of another claim held by the same party or where it is outside the claim proper in the shape of road, building, ditch, etc. For stoping, or any work whatever done upon and within the lines of the claim in the nature of mining or preparing for mining is strictly within the terms of the statute.—*Wailes v. Davies,* 158 F. 667, 164 F. 397, 90 C. C. A. 385. A cross-cut started on the claim, above the vein, intended to benefit itself and a claim further up, would count for work on both claims; upon the claim on which it started because within its lines, and for the claim above because driven for its benefit.

Assessment work outside the claim must be of value to the claim intended to be protected.—*Little Dorrit Co. v. Arapahoe Co.*, 30 Colo. 431, 71 P. 389.

The Court should not substitute its judgment for that of the mine owner as to the expediency of the plan of work unless it could have no reasonable adaptation to the end in view, but on the facts of the case it was held that the work was too far away to count as any possible improvement on the claims in question.—*Copper Mt. Co. v. Butte Co.*, 39 Mont. 487, 133 Am. St. Rep. 595, 104 P. 540.

On the other hand, work on one of seven or eight claims was allowed to count for all when the possibility of benefit to the other claims was extremely remote.—*Nevada Co. v. Spriggs*, 41 Utah 171, 124 P. 770; STRAUP, J., dissented.

Unwatering the Mine.

The case of *Evalina Co. v. Yosemite Co.*, 15 Cal. App. 714, 115 P. 946, presents a peculiar state of facts. The work done by the parties alleged to be in default "was done for the sole purpose of unwatering the mine so that it could be examined by a prospective purchaser. They testified that it was not done as assessment work nor was it intended to be so considered."

The Court said that it was not such work "as is contemplated by the United States Statute."

Were it not for the voluntary waiver contained in the above quotation we would consider the ruling debatable and even then it seems analogous to the case of *Crary v. Dye*, 208 U. S. 515, 52 L. Ed. 595, 28 Sup. Ct. Rep. 360, where a man was held not bound by an admission that he had no title when he was under a misapprehension of the law and his title in fact was good.

The unwatering of a mine is as much work as drilling or blasting and the fact that it was done to put the mine in shape to show to a buyer would not lessen the cost nor diminish the labor.

And yet there is much to be said on the other side. It is not so much work on the mine as it is work to get ready to work on the mine (which is not computed as part of the annual labor) and extreme cases can be imagined where a man might unwater his mine from year to year without any added development whatever.

Diverse Ownerships in Group or in Tunnel.

Work done by tunnel intended to cut two claims owned by the same person is good to hold both.—*Book v. Justice Co.*, 58 F. 107, 17 M. R. 617. Work done on one of a group held in different names but really owned in common has been ruled to avail for all.—*Eberle v. Carmichael*, 8 N. M. 169, 42 P. 95. And we see no reason why a tunnel owned in common and worked by the joint labor or contributions of the several owners of different claims intended to be cut by such tunnel should not avail to protect each claim provided the full $100 is expended for each claim.—*Fissure Co. v. Old Susan Co.*, 22 Utah 438, 63 P. 587.

A blacksmith shop used for the benefit of the claim in controversy, and for other claims, can not be counted for annual labor with no proof of how much of its value could be apportioned to the claim in controversy.—*Upton v. Santa Rita Co.*, 14 N. M. 96, 89 P. 276.

The questions of group work and outside work are fully considered by the Supreme Court of South Dakota in *Hawgood v. Emery*, 22 S. D. 573, 133 Am. St. Rep. 941, 119 N. W. 177. The case in particular holds that work done on a claim owned by one party alone can not avail for work on a neighboring claim in which he has an undivided interest although such work might benefit such claim. The opinion seems to intimate that such work might count for the claims held in common if there had been an agreement to such effect.

ANNUAL LABOR BY TUNNEL. See p. 319.

Amount, How Estimated—District Rules.

As to such district rules as attempt to fix the value of a day's labor above its real cost in estimating the amount of work done, they amount to absolutely nothing. The "fiat" does not alter the "fact." The true measure is the real expenditure.—*Wright v. Killian,* 132 Cal. 56, 64 P. 98, 21 M. R. 211; *Penn v. Oldhauber,* 24 Mont. 287, 61 P. 649; *Woody v. Barnard,* 69 Ark. 579, 65 S. W. 100; *Ware v. White,* 82 Ark. 220, 108 S. W. 831. And if the work has been done, or the materials furnished by the owner himself, the measure of value is what it would have cost to procure the same labor and materials from a second party—in other words, the market value of the labor and materials.—*Quimby v. Boyd,* 8 Colo. 194, 342, 6 P. 462, 7 P. 288. And its enhancing the value of the claim is no test.—*Mattingly v. Lewisohn,* 13 Mont. 508, 35 P. 111, 17 M. R. 693.

The test is what the work was worth, rather than what was paid for it, but what was paid for it goes to prove its value.—*Stolp v. Treasury M. Co.,* 38 Wash. 619, 80 P. 817; *McCormick v. Parriott,* 33 Colo. 382, 80 P. 1044. A party can not put an arbitrary price on his own labor.—*McKay v. Neussler,* 148 F. 86, 78 C. C. A. 154.

The Fact that the Work has Not Yet Been Paid For Does Not invalidate its sufficiency to count as annual labor.—*Lockhart v. Rollins,* 2 Ida. 540, 21 P. 413, 16 M. R. 16; *Coleman v. Curtis,* 12 Mont. 301, 30 P. 266.

Full payment for the work will not save the claim where the party hired to do it makes only a pretense of performance. —*Protective M. Co. v. Forest City Co.,* 51 Wash. 643, 99 P. 1033.

Rightful Owner Out of Possession.

Where possession is wrongfully taken and withheld, the rightful owner is excused from the necessity of doing the work.—*Utah Co. v. Dickert Co.,* 6 Utah 183, 5 L. R. A. 259,

21 P. 1002; *Slavonian Co. v. Perasich,* 7 F. 331, 7 Sawy. 217, 1 M. R. 541; *Mills v. Fletcher,* 100 Cal. 142, 34 P. 637, 17 M. R. 671; *Trevaskis v. Peard,* 111 Cal. 599, 44 P. 246, 18 M. R. 353; *Field v. Tanner,* 32 Colo. 278, 75 P. 916.

A relocator can not take advantage of the fact that the work was not done when prevented by his own act.—*Garvey v. Elder,* 21 S. D. 77, 130 Am. St. Rep. 704, 109 N. W. 508.

Performance of Annual Labor After the Year Has Expired—Two Parties Essential to Forfeiture.

The neglect to do the annual labor required by the United States government by no means works a forfeiture of the claim.—*Lakin v. Sierra Buttes Co.,* 25 F. 343, 11 Sawy. 231; *Lacey v. Woodward,* 5 N. M. 583, 25 P. 785. To illustrate: If a lode was located in 1890 and after that year no annual work was done until 1896 (when a period of five full years would have intervened), and in 1896 the owner enters and performs $100 worth of work for that year, he continues to be the owner of the claim, and his title relates back to the original location of 1890; *provided always,* that the lode has not been relocated in the meantime.—*Crown Point M. Co. v. Crismon,* 39 Or. 364, 21 M. R. 406, 65 P. 87; *Peachy v. Gaddis,* 14 Ariz. 214, 127 P. 739.

It requires two parties to make a forfeiture absolute: First, the party who abandons, and, second, the party who relocates. The second party therefore must take advantage of the first party's default before such default can enure to the second party's benefit.—*Little Gunnell Co. v. Kimber,* Fed. Cas. No. 8402, 1 M. R. 536; *Beals v. Cone,* 27 Colo. 473, 83 Am. St. Rep. 92, 20 M. R. 591, 62 P. 948; *Madison v. Octave Oil Co.,* 154 Cal. 768, 99 P. 176.

The fact that failure to do the work does not *ipso facto* work a forfeiture and the fact that advantage of the default must be taken by some adverse party are important in several classes of cases:

First—Where the work done before the neglect is necessary to complete the $500 worth of improvements required before patenting.

Second—Where in a suit of ejectment between two claims it is necessary to prove priority and carry the title back to the original location.

Third—Where a party has neglected to do his annual work and a third party has entered for purpose of relocation.

Fourth—The fact that neglect to do one or more years' labor does not, *ipso facto*, operate as a forfeiture is of special importance in the case of overlapping claims, where the junior claim has been worked and the senior claim has not been worked.

1. Where the Work Done Before the Neglect Is Necessary to Complete the $500 Worth of Improvements Required Before Patenting.

If failure to do one year's work operates, *ipso facto*, to defeat the location, in such case the title would have to date from the date of resumption; in fact, a new location would have to be made by the owner. But the failure not having been taken advantage of in due time, the old title remains, dates from original discovery, and consequently old work and new count together as improvements on the claim for purpose of patenting.

2. Where It Is Essential to Carry the Title Back to Discovery.

The remarks of the foregoing paragraph apply also to this heading. The doctrine of relation carries a title back to the first step in its inception, always excepting where an adverse right has intervened. As the failure of itself works no forfeiture, the continuity in this case is not broken. A location, however, made over a claim where the work has not been done (before *bona fide* resumption by the owner) would break this continuity and would take the conflict, whether it pur-

ported to be a relocation of the defaulting claim or only incidentally took some of its ground.

It has been held that where work was not done and the ground located by a third party who later failed to keep up his work and the original owner returns and resumes work, the original title remains valid, notwithstanding the intervening location.—*Justice M. Co. v. Barclay,* 82 F. 554, 19 M. R. 68; *Klopenstine v. Hays,* 20 Utah 45, 57 P. 712. See 2 Lindley, 3d Ed., Sec. 651.

3. Where a Third Party Has Begun to Relocate—Resumption by Owner.

The words of the Act relative to this class of cases are as follows:

> Provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

If the location of the third party is complete before the reentry of the original owner, of course the original owner is too late. If, on the other hand, the original owner has *bona fide* resumed work before the attempted location over his ground, his original title becomes revested the moment he has completed an amount of work equivalent to that required for the previous year. But where the third party has entered, and before he completes his location the original owner also enters and resumes work, the question remains: Is such reentry of the owner sufficient to defeat the intervening claimant? The Act says that the owner may resume work at any time "before such location." The location of the intervenor is not complete until he has done a series of acts, usually requiring several days to consummate. The locator must sink a shaft ten feet in depth, and set his stakes. In the meantime has the original owner the right to resume work? It was so decided in the case of *Pharis v. Muldoon,* 75 Cal. 284, 15 M. R. 348, 17 P. 70. There, however, the relocator had entered and posted his notice just after midnight of the last day of the year and the original owner resumed work by

the usual hour for honest labor on the morning of the first. The relocator had barely a technical case, if any. In another instance, on facts much stronger for the second party (*Gonu v. Russell,* 3 Mont. 358, 12 M. R. 630), it was distinctly held that the re-entry of the original owner before the newcomer's location was completed would save the forfeiture. The same court reaffirms this ruling in *McKay v. McDougall,* 25 Mont. 258, 87 Am. St. Rep. 395, 64 P. 669.

On the contrary, HALLETT, J., in the case of *Little Gunnell Co. v. Kimber,* Fed. Cas. No. 8402, 1 M. R. 536, held that the party attempting to take up abandoned property has the same period of three months to complete his location, which is allowed by law to a discoverer; and *Pelican Co. v. Snodgrass,* 9 Colo. 339, 12 P. 206, is to the same effect.

We have little doubt of the correctness of the latter opinion. "The condition of development should be attached to every mine; and courts should, as far as consistent with legal principles, maintain the construction of mining customs which accomplish this end."—*King v. Edwards,* 1 Mont. 235, 4 M. R. 480; *Russell v. Brosseau,* 65 Cal. 605, 4 P. 643.

In *Belcher Co. v. Deferrari,* 62 Cal. 160, plaintiff, the original owner, did only one-half the required amount in 1880. In January, 1881, he did $24 worth of work on two claims. Defendant relocated in August, 1881. *Held:* That the plaintiff had resumed work and was entitled to recover. Such a decision is only trifling with the law and the rights of parties based on the law. On a case of like facts the contrary has since been held by the same court.—*McCormick v. Baldwin,* 104 Cal. 227, 37 P. 903.

In the well considered opinion in *Honaker v. Martin,* 11 Mont. 91, 27 P. 397, 17 M. R. 434, the cases on this subject are reviewed by BLAKE, C. J., and it was decided that where a resumption takes place it must be substantial, and result in the prompt performance of at least the full amount which should have been done the previous year. It does not decide in terms as in the Pelican case and Gunnell case, that the

resumption is too late when the first act of relocation has been initiated, but it bears out the argument to the same result.

The owners of the Nellie were on the ground December 31, and resumed work on January 1. The same day the Equator was located over the Nellie. The Court held that such location could not be initiated while the ground still remained unforfeited, the owners having resumed the work, though they afterwards failed to complete the full assessment.—*Jordan v. Duke,* 6 Ariz. 55, 53 P. 197.

Labor when resumed must be prosecuted with reasonable diligence till the $100 is complete.—*Hirschler v. McKendricks,* 16 Mont. 211, 40 P. 290.

Where a claimant is at work on the last day of the year intending to continue work on the next day, a party who attempts to relocate before the usual hour to start work is a trespasser.—*Willitt v. Baker,* 133 F. 937.

Where a party is at work on January 1 and continues at work, it makes no difference that the work for the elapsed year was not done. The resumption saves the claim.—*Anderson v. Robinson,* 63 Or. 228, 126 P. 988, 127 P. 546.

Where resumption of work is relied on the burden of proof is on the original owner to show that it preceded the relocation.—*McKnight v. El Paso Co.,* 16 N. M. 721, A. C. 1912D, 1309, 120 P. 695.

No Resumption in Alaska.

Under the Special Act concerning annual labor in Alaska, p. 114, the work must be done during the year and resumption will not save the claim.—*Thatcher v. Brown,* 190 F. 708, 111 C. C. A. 436.

4. Work Neglected on Senior Claim Overlapped by Junior Claim.

Where a local statute provides for filing relocation certificate to take in the overlap of the senior claim, which has

become abandoned, we have no doubt that such filing is necessary to give it to the junior claimant.—*Moorhead v. Erie M. Co.*, 43 Colo. 408, 96 P. 253. Even without such statute it was generally conceded that the failure did not *ipso facto* give it to the junior claimant.—2 Lindley 3d Ed., Sec. 363; 1 Snyder, Sec. 574. It was so expressly decided in *Oscamp v. Crystal R. Co.*, 58 F. 293, 7 C. C. A. 233, 17 M. R. 651. In numberless instances the two claimants, being on friendly relations, the junior claimant has no desire to take advantage of the failure of the senior claimant to do his work for a single year. Does the law then give it to him against his will? The only authority we know of supporting such proposition is an isolated *dictum* in *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 235.

Three Successive Locations.

There are three cases in the Federal Supreme Court, *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. Ed. 1119, 25 Sup. Ct. Rep. 716; *Brown v. Gurney*, 201 U. S. 184, 50 L. Ed. 717, 26 Sup. Ct. Rep. 509; *Farrell v. Lockhart*, 210 U. S. 142, 16 L. R. A. (N. S.) 162, 52 L. Ed. 994, 28 Sup. Ct. Rep. 681, in each of which there was a first, second and third location of substantially the same ground, the second being made while the first was a valid subsisting claim, but which later was abandoned or became forfeited. The question then arises: Did the second claim, initiated by trespass upon the rights of the first, become valid upon the legal decease of the first? Or, did the third, which was not begun until the lapse of all title in the first claim, become the better title?

In the Brown case the south 700 feet of the Kohnyo lode, by certain proceedings in the Land Office, became vacant ground on June 14, 1898. The Scorpion had been located over the same area in May, while the Kohnyo was still a valid claim. The Hobson's Choice was not located until after June 14. The Court held that the Scorpion location was void, that the loss of the Kohnyo title did not enure to benefit the Scorpion, and

that the Hobson's Choice, the first location after the ground had reverted to the public domain, was the winning title.

In the Farrell case the South Mountain lode was located in 1900, the Cliff lode in 1901, while the S. M. lode was not in default as to annual labor. The Divide lode was located in 1903 after the S. M. lode had failed to do any work for 1901 or 1902. The opinion cites the Lavagnino case and says it should be qualified so as to allow the third location to attack the second location on the ground that it was a trespass on the first location.

In the Lavagnino case the Levi P. lode was the first located. While it was a valid subsisting claim the Uhlig lode was located over it. The Uhlig was therefore at the date of its location not a valid claim. After the year for annual labor had expired, and no labor performed, the Yes You Do lode was located over the same ground. The Uhlig lode applied for patent and the Levi P. lode adversed. The Yes You Do lode filed no adverse. The Court held that the conceded rule that upon abandonment the ground became public domain did not apply where an application for patent had been made and the abandoned lode did not adverse.

The Brown and Farrell cases are consistent with each other and with the basic case of *Belk v. Meagher* which started the proposition that no valid claim could be initiated within the lines of a prior subsisting claim, but the Lavagnino case discarded that rule.

The Lavagnino case was fully analyzed in *Nash v. McNamara,* 30 Nev. 114, 133 Am. St. Rep. 694, 16 L. R. A. (N. S.) 168, 93 P. 405, and was cited cautiously in *Montagne v. Labay,* 2 Alaska 575. But it is now a matter of legal retrospect and was set at rest by *Swanson v. Sears,* 224 U. S. 180, 56 L. Ed. 721, 32 Sup. Ct. Rep. 455; Lindley, 3d Ed., Sec. 645A.

In this Swanson case the Emma was located in 1881. While it remained a valid location the Independence was located on a discovery on Emma ground. The Emma failed to do its

work for 1903 and was relocated by its owner in 1904. The Court held that the Independence, being originally void, was not validated by any default or failure of title on the Emma. It affirms the case below as reported in 17 Ida. 321, 105 P. 1059, under the style of *Swanson v. Kettler.*

A location within the lines of a senior claim is void, and subsequent abandonment of the senior claim does not make the junior valid.—*Street v. Delta Co.,* 42 Mont. 371, 112 P. 702; *Moorhead v. Erie Co.,* 43 Colo. 408, 96 P. 253.

Failure to perform for one year with relocation by stranger who defaulted does not destroy the old title.—*Richen v. Davis,* 76 Or. 311, 148 P. 1130.

Although the burden of proof is usually upon a party alleging forfeiture, yet, when it is alleged that a certain location is void because made upon a prior valid claim, the burden is upon the party making such allegation to prove that such prior claim was not forfeited.—*Willison v. Ringwood,* 190 F. 550, 111 C. C. A. 401, following *Farrell v. Lockwood, supra.*

The Relocator No Trespasser.

When the year has expired and the work has not been done a third party has the right to enter within its boundaries and relocate the claim, although the original owner be still (constructively) in possession.—*DuPrat v. James,* 65 Cal. 555, 15 M. R. 341, 4 P. 562; *Brown v. Oregon King Co.,* 21 M. R. 485, 110 F. 728.

A Relocation Begun Before the Year Expires Is Void.

—*Belk v. Meagher,* 3 Mont. 65, 1 M. R. 522. An entry on ground not in default can not be made with intent to make a provisional location, to be asserted if the original locator fails to do the annual labor.—*Rooney v. Barnette,* 200 F. 700, 119 C. C. A. 116.

Equity of the Annual Labor Law.

The opposition to the requirement of annual labor so evident when it was first imposed has long since yielded to a concession of its equity even in the case of claims located before its passage.

The holder has no just right to prevent the government disposing of such claims as he is unwilling or unable to work, to such as are ready to assume the risk and develop the deposit, the estate of the holder not being absolute, but by implied contract and general mining custom conditioned upon development, of which development the government has merely fixed the amount by the Act of 1872, and that at a reasonable limit.

Development is the condition upon which the government allows the miner to hold his possessory title and afterwards perfect it by patent.—*Erhardt v. Boaro,* 113 U. S. 527, 28 L. Ed. 1113, 5 Sup. Ct. Rep. 560, 15 M. R. 472; *O'Reilly v. Campbell,* 116 U. S. 418, 29 L. Ed. 669, 6 Sup. Ct. Rep. 421; *Kramer v. Settle,* 1 Ida. 485, 9 M. R. 561. Nevertheless, the Act is to be strictly construed against forfeiture.—*Emerson v. McWhirter,* 133 Cal. 510, 65 P. 1036, 21 M. R. 470.

It is no objection to testimony to disprove annual labor that it is negative in character; it is necessarily so. The evidence reviewed and held to outweigh the positive testimony that it was done.—*First Nat. M. Co. v. Altvater,* 149 F. 393, 79 C. C. A. 213. Evidence reviewed and held proof of labor performed.—*Smith v. Mt. Gulch Co.,* 12 Ida. 219, 85 P. 918.

Neglect to do the work forfeits the claim, although the locator remains in possession.—*Goldberg v. Bruschi,* 146 Cal. 708, 81 P. 23.

As to the Plea of Forfeiture for Failure to Perform, see Page 113. In adverse claim suits, page 620.

The Burden of Proof Is Upon the Party Asserting That the work was not done.—*Quigley v. Gillett,* 101 Cal. 462, 35 P. 1040, 18 M. R. 68; *Hall v. Kearny,* 18 Colo. 505, 17 M. R. 594,

33 P. 373; *Harris v. Kellogg,* 117 Cal. 484, 49 P. 708; *Axiom Co. v. White,* 10 S. D. 198, 72 N. W. 462; *Beals v. Cone,* 27 Colo. 473, 83 Am. St. Rep. 92, 20 M. R. 591, 62 P. 948; *Lancaster v. Coale,* 27 Colo. App. 495, 150 P. 821. And the proof should be clear and convincing.—*Strasburger v. Beecher,* 20 Mont. 143, 49 P. 740; *Dibble v. Castle Chief Co.,* 9 S. D. 618, 70 N. W. 1055; *Crown Point Co. v. Crismon,* 39 Or. 364, 21 M. R. 406, 65 P. 87; *Upton v. Santa Rita Co.,* 14 N. M. 96, 89 P. 275; *Gear v. Ford,* 4 Cal. App. 556, 88 P. 600. As to burden of proof when the work was done outside the claim, see p. 124.

The question whether the work was done is for the jury and the Court can not take it from them when there was evidence to prove it.—*Knickerbocker v. Halla,* 162 F. 318, 98 C. C. A. 298.

On Rebuttal the Other Side May Show That the Work Done

off the claim did not benefit the claim. But the work done need not be that which would be most beneficial to the claim.—*Sherlock v. Leighton,* 9 Wyo. 297, 63 P. 580, 934.

Proof that the labor in question had been applied as improvements on application for patent on another claim is admissible.—*White River Co. v. Langston,* 76 Ark. 420, 88 S. W. 971.

Proof of Annual Labor.

R. S. Colo. Sec. 4209.—Within six months after any set time or annual period allowed for the performance of labor or making improvements upon any lode claim or placer claim, the person on whose behalf such outlay was made, or some person for him, may make and record in the office of the recorder of the county wherein such claim is situate, an affidavit in substance as follows: * * *

The continuation of the section contains a form, same as on page 139, and makes the affidavit, or a certified copy, *prima facie* evidence of the performance. The object of this section is to provide a convenient method of preserving proof of the

labor performed by making the affidavit *prima facie* evidence of the fact.—*Coleman v. Curtis,* 12 Mont. 301, 30 P. 266.

Like acts exist in most of the other States, the time for filing the certificate being: In Arizona within three months; California and Washington within 30 days; Idaho and New Mexico within 60 days after the period allowed for performance. In Montana 20 days, Nevada and Wyoming 60 days, Utah 30 days after completion of work.

The affidavit is only *prima facie* evidence and may be contradicted.—*Dickens Co. v. Crescent Co.,* 26 Ida. 153, 141 P. 566.

For proof of annual labor in Alaska, see p. 636.

Failure to File Affidavit of Labor.

The neglect to file proof of labor, if the labor has in fact been done, would not leave the lode open to relocation, and the doing of the labor can be shown by oral testimony.—*McGinnis v. Egbert,* 8 Colo. 41, 15 M. R. 329, 5 P. 652; *Book v. Justice Co.,* 58 F. 118, 17 M. R. 617; *Murray Hill Co. v. Havenor,* 24 Utah 73, 21 M. R. 668, 66 P. 762. But the precaution to file should by no means be neglected. The filing makes out the proof of the fact of the labor being done, which might afterwards be a difficult matter to show.

The California Act of 1891 purported to make the filing obligatory.—*Harris v. Kellogg,* 117 Cal. 484, 49 P. 708, and in Idaho the failure to file is *prima facie* evidence that the work has not been done.

The great objection to annual labor, with the professional mind, is that it throws a mining title upon constant parol proof, takes it out of the chain of title as found recorded, and makes it depend upon the existence of facts which do not appear of record. This evil should be obviated as far as possible by precautions, such as are above suggested; but, after all, the result remains, that no claim can be considered secure until a patent is obtained and the title taken out of the class of conditional estates.

FORM OF AFFIDAVIT OF LABOR PERFORMED.

STATE OF COLORADO, } ss.
Summit County. }

Before me, the subscriber, personally appeared, *Thomas A. Brown*, who being duly sworn, saith that at least *one hundred* dollars' worth of work or improvements were performed or made upon the *Chaos Lode*, situate on *Silver* mountain, in *Avalanche* Mining District, County of *Summit*, State of Colorado, between the first day of January, A. D. 1915, and the thirty-first day of December, A. D. 1915. Such expenditure was made by or at the expense of *Robert W. Foote*, owner (or one of the owners) of said claim, for the purpose of complying with the law and holding said claim.

(Jurat.) THOMAS A. BROWN.

A single affidavit may be filed for the labor on several claims.—*McGinnis v. Egbert*, 8 Colo. 41, 15 M. R. 329, 5 P. 652. And it may be filed before the year elapses.—*Id.* But not after the time limited by the Statute.—*McKnight v. El Paso Co.*, 16 N. M. 721, Ann. Cas. 1912D, 1309, 120 P. 695.

Certificate in Lieu of Annual Labor.

In 1893 and 1894 Congress passed Acts suspending for each of those years the requirement of annual labor, provided the claimant recorded a notice of his intention to hold and work the claim.—28 St. L. 6, 114. In both Acts South Dakota was excluded.

There can be no forfeiture for failure of co-tenant to contribute his proportion of expenditure for 1893, when he has filed the certificate allowed by the Act, even where the work had been done before the Act was passed. There is no vested interest in a right to enforce a penalty.—*Royston v. Miller*, 76 F. 50, 18 M. R. 418.

When the Ground Is in Litigation the Court May Appoint

a receiver to see that the work is performed and a forfeiture prevented.—*Nevada Co. v. Home Co.*, 98 F. 673, 20 M. R. 283.

It is not contempt of a mining injunction to perform the amount of labor necessary to save the claim from forfeiture.—*Silver Peak Mines v. Hanchett*, 20 M. R. 19, 93 F. 76.

Duty of trustee to do annual labor. If he refuses beneficiary may perform.—*Anderson v. Robinson,* 63 Or. 228, 126 P. 988, 127 P. 546. Where the lessor enjoined the lessee from working, it excused him from his covenant to do the annual labor.—*Halla v. Rogers,* 187 F. 778, 109 C. C. A. 626.

A party made a new location over an older claim which he afterwards purchased. *Held:* that the work done on the new location could be treated as annual labor for the protection of the older title.—*Johnson v. Young,* 18 Colo. 630, 34 P. 173.

Breach of Contract to Perform.

In *Stamey v. Hemple* defendant had agreed to do the annual labor, which he failed to do and, as the complaint alleged, the claims were relocated on the first of January. The Court held that the defendant was liable in any event for the $100 on each claim and intimated that he would be liable for the full value of the claims unless he was able to show that the plaintiff might have saved his title by reasonable exertions.—173 F. 61, 97 C. C. A. 379.

ANNUAL LABOR ON PLACERS.

Judicial Rulings As to Labor on Placers.

The question of annual labor on placers is a curious instance of the growth of law by following the first judicial oversight as a precedent until the wrong interpretation is firmly rooted as the true one. By no fair construction of the Act of 1872 could it be applied to anything except lode claims. The very amount of the labor was fixed by the number of feet "in length along the vein." But in 1876, in *Chapman v. Toy Long,* 4 Sawy. 28, 1 M. R. 497, Fed. Cas. No. 2610, placers were referred to incidentally as subject to the labor law. In *Jackson v. Roby,* 109 U. S. 440, 27 L. Ed. 990, 3 Sup. Ct. Rep. 301, without argument, the same *dictum* was expressed. Later,

in *Carney v. Arizona Co.,* 65 Cal. 40, 2 P. 734, the point was definitely made as to whether such labor was required on placers, and the Supreme Court of California, basing their opinion on the force of the general terms of Sec. 2329—a section enacted two years prior to the annual labor section—sustain the affirmative of the proposition. In *Sweet v. Webber,* 7 Colo. 443, 4 P. 752, the precedents thus established were followed without reference to the original statute.—*Morgan v. Tillotson,* 73 Cal. 520, 15 P. 88.

A single record of a placer claim, whether of 20 acres by one person or 160 acres by eight persons, is one full claim and requires $100 annual expenditure to protect it and $500 to patent it. In other words a 20-acre claim requires as much annual labor and patent expenditure as a 160-acre claim. One hundred dollars' labor on each 20 acres of an association placer is not required.—*Rooney v. Barnett,* 200 F. 700.

Work done outside the claim to avail as annual labor must be shown to be of benefit to the placer—the same as in the case of lode claims.—*Anvil Co. v. Code,* 182 F. 205, 105 C. C. A. 45.

The Forms of Affidavit, Notice and Proof of Forfeiture Given for lode claims will apply with obvious alterations to placers.

Void State Legislation.

In 1879 the Legislature of Colorado passed an Act fixing the amount of annual labor on placers, altering the period during which it was to be performed, and providing for forfeiture of the delinquent co-owner's interest. It was declared in conflict with the Congressional Act in attempting to lessen the annual expenditure in *Sweet v. Webber,* 7 Colo. 443, 4 P. 752. It was obviously so in its attempt to interfere with the beginning and end of the annual period. All such statutory provisions are superfluous where they agree with the Act of Congress and nugatory where they conflict with it.

Special A. C. as to Group Oil Claims.

That where oil lands are located under the provisions of title thirty-two, Chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all; *Provided*, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims.—*Feb. 12, 1903. 32 St. L. 825. Comp. L. 1911, p. 611.*

This section is construed in *Smith v. Union Oil Co.*, 166 Cal. 217, 135 P. 967. See p. 689.

FORFEITURE TO CO-OWNER.

By Failure to Do Annual Labor—Notice.

R. S. Sec. 2324.— * * * Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.—*Sec. 5, A. C. May 10, 1872.*

Oregon supplements this section by an Act in minute detail. —Laws of 1903, p. 326.

The provision for forfeiture to co-owners is not unconstitutional and equity will enforce it.—*Van Sice v. Ibex Co.*, 173 F. 895, 97 C. C. A. 587.

Expenditures in Excess of the Statutory Amount.

Although one co-owner has expended more than enough to hold the claim, the delinquent co-owner, to save forfeiture under the Act of Congress, is only required to pay or tender

his proportion of the amount which the law required to be expended upon the claim.

The recovery of his proportion of additional expenditures depends upon other grounds, and is to be enforced only by judicial proceedings, involving the question of mining partnership accounts or the expressed or implied assent of the co-owner to the expenditure of the additional amount.—5 L. O. 4; *Neuman v. Dreifurst,* 9 Colo. 228, 11 P. 98; *McCord v. Oakland Q. Co.,* 64 Cal. 134, 27 P. 863, 49 Am. Rep. 686. The distinction is clearly expressed in *Holbrooke v. Harrington* (Cal.), 36 P. 365.

The delinquent co-owner is not bound to pay his proportion of the annual labor as a debt.—*McDaniel v. Moore,* 19 Ida. 43, 112 P. 317.

If There Are Three Owners and One Performs All the Labor,

and gives notice to his co-owners, and one of them pays his proportion and offers to pay one-half and join in the division of the forfeited interest of the third party, we apprehend the second party may refuse such proposition. The forfeiture accrues solely to him who has performed the labor.—31 L. D. 178.

Estoppel.

When a co-owner is delinquent, but the party who has made the expenditure afterwards associates with him in developing the claim, it would probably be considered a waiver of the forfeiture.

Burden of Proof.

The presumption in law is always against forfeiture, and the party who asserts it must be prepared to make his proof in such case.—*Turner v. Sawyer,* 150 U. S. 578, 17 M. R. 683, 37 L. Ed. 1189, 14 Sup. Ct. Rep. 192.

Amount and Place of Expenditure.

Where a forfeiture notice covered two claims it was held void for not stating the "amount of money spent upon each claim *nor the facts which might exclude expenditure upon each claim.*"—*Haynes v. Briscoe,* 29 Colo. 137, 67 P. 156, 21 M. R. 720. The clause in italics we apprehend refers to the possible case of group work where the full amount might have been expended on a single claim.

Choice Between Personal Service and Publication.

If the demand is made by personal service of the forfeiture notice the delinquent must comply within ninety days from date of service. If publication be made the forfeiture is not complete until ninety days after the last publication.

If publication be attempted it can not be turned into personal service by showing that copies of the paper were sent to and received by the party in default.—*Haynes v. Briscoe, supra.* And publication of forfeiture notice is a waiver of prior personal demand.—*Knickerbocker v. Halla,* 177 F. 172, 100 C. C. A. 634.

Nearest Newspaper.

As to what is the "newspaper published nearest the claim" the construction followed by STEELE, J., in *Haynes v. Briscoe,* seems to be clearly right; to wit: that it means nearest in a direct line, and not by the usually traveled route.

Length of Publication.

Publication for thirteen weeks was held sufficient in *Elder v. Horseshoe Co.,* 15 S. D. 124, 102 Am. St. Rep. 681, 21 M. R. 510, 87 N. W. 586; affirmed, 194 U. S. 248, 48 L. Ed. 960, 24 Sup. Ct. Rep. 643.

Proceedings to Enforce Forfeiture.

In the first instance file the usual affidavit of labor performed, in the form given on p. 139.

FORFEITURE NOTICE. (A)

GEORGETOWN, COLO., January 3, 1916.

To Robert H. Tinker:

You are hereby notified that I have expended during the year 1915 *one hundred dollars* in labor and improvements upon the *Corinne Lode* Mining Claim, situate on *Republican Mountain* in *Griffith* Mining District, County of *Clear Creek*, State of Colorado, the location certificate of which is found of record in *book 20, page 222,* in the office of the recorder of said county, in order to hold said claim under the provisions of section 2324 of the Revised Statutes of the United States, and the amendment thereto approved January 22, 1880, concerning annual labor upon mining claims, being the amount required to hold said lode for the period ending on the 31st day of December, A. D. 1915. And if, within ninety days from the personal service of this notice, *or within ninety days after the publication thereof,* you fail or refuse to contribute your proportion of such expenditure as a co-owner, which amounts to fifty dollars, your interest in the claim will become the property of the subscriber, your co-owner, who has made the required expenditure, by the terms of said section. JAMES H. PERSHING.

If the demand contained in this Forfeiture Notice is not complied with, within the prescribed period, it should be recorded after making proof of its service or publication, which can be most readily done by endorsement upon the Notice "A" as follows:

PROOF OF FORFEITURE. (B)

STATE OF COLORADO, County of *Clear Creek:* ss.

James H. Pershing, being duly sworn, saith that he served the within forfeiture notice upon *Robert H. Tinker,* the delinquent co-owner therein named, upon the *17th* day of *March, A. D. 1916,* at said county, by delivering to him a true copy of the same and explaining the contents thereof; and that the said *Robert H. Tinker* wholly failed to comply with the demand contained in said notice or to pay or tender his proportion of said expenditures during the period of ninety days after said date or at any time since hitherto. JAMES H. PERSHING.

Sworn and subscribed before me this *first* day of July, A. D. 1916.

[SEAL] *John Tomay,*
Notary Public.

The above form completes the proceeding where the notice has been personally served, but where it has been by publication, discard the form "B" and use the following "C" and "D."

PROOF OF PUBLICATION. (C)

STATE OF COLORADO, County of *Clear Creek:* ss.

(Copy of Notice "A" Attached.)

Jesse Randall, being duly sworn, saith, that he is the publisher of the *Georgetown Courier,* a weekly newspaper published in said county, and that said *Georgetown Courier* is the newspaper published nearest to said *Corinne* Lode Claim, and that the above notice was published in said paper fourteen successive weeks, the first publication appearing in the issue of *January 7, 1916,* and the last publication in the issue of *April 8, 1916.*

JESSE RANDALL.

Sworn and subscribed before me this *tenth* day of *April, A. D. 1916.*

[SEAL] *John Tomay,*
Notary Public.

Upon the publisher's proof (C), the party who has done the work will endorse his affidavit of non-payment as follows:

AFFIDAVIT OF NON-PAYMENT. (D)

STATE OF COLORADO, County of *Clear Creek:* ss.

James H. Pershing, being duly sworn, saith, that *Robert H. Tinker,* the person named in the forfeiture notice attached to the within proof of publication, wholly failed to comply with the demand contained in said notice or to pay or tender his proportion of said expenditures, during the period of said notice or within ninety days thereafter, or at any time.

JAMES H. PERSHING.

Sworn and subscribed before me this *tenth* day of *July, A. D. 1916.*

[SEAL] *John Tomay,*
Notary Public.

These forms "A" and "B," in cases of personal service, and "A," "C" and "D" in cases of advertisement, complete the forfeiture and place its proof in a shape where it is recognized in all land office proceedings as the equivalent of a deed from the delinquent party; but when the forfeiture has to be proved in court these *ex parte* proceedings would not be recognized, except the publisher's proof (if this proceeding can be considered as an advertisement required by law) which is in Colorado made evidence by statute R. S., Sec. 2503. Similar procedure for proof of statutory publication is provided by statutes generally.

The forfeiting party is not bound by law to make record proof of the forfeiture except as it may be required by the practice of the Land Office.—*Riste v. Morton,* 20 Mont. 139, 49 P. 656.

Minor Heirs—Grouping Notice.

In *Elder v. Horseshoe Co.,* 15 S. D. 124, 102 Am. St. Rep. 681, 21 M. R. 510, 87 N. W. 586, affirmed in 194 U. S. 248, 48 L. Ed. 960, 24 Sup. Ct. Rep. 643, it was held that the failure of a co-tenant to pay for his share of the work was a breach of the condition under which he held title; that there was no saving of the rights of minor heirs; that a notice of forfeiture for several consecutive years was valid and that it was optional to serve personal or publish printed notice of forfeiture. But notice to the administrator instead of to the heir will not avail even if the administrator communicates such notice to the heir.—*O'Hanlon v. Ruby Gulch Co.,* 48 Mont. 65, 135 P. 914.

Parties—Defenses.

A party not a co-tenant at time of notice can not be deprived of an after acquired title by such notice. Even a patent procured by the forfeiting title will stand to the use of such party.—*Turner v. Sawyer,* 150 U. S. 578, 37 L. Ed. 1189, 14 Sup. Ct. Rep. 192, 17 M. R. 683.

The attempted forfeiture is a void proceeding where his share of work has been in fact done by the co-tenant alleged to be in default.—*Brundy v. Mayfield,* 15 Mont. 201, 38 P. 1067; *Thompson v. Pack,* 219 F. 624. Or where the forfeiting co-tenant did not in fact do the labor.—*McKay v. Neussler,* 148 F. 86, 78 C. C. A. 154; *Delmoe v. Long,* 35 Mont. 139, 88 P. 778. Or only a part of the labor.—*Pack v. Thompson,* 223 F. 635-645.

A forfeiture notice is not good against a co-owner not named in the notice.—*Ballard v. Golob,* 34 Colo. 417, 83 P. 376.

It has been held that the regularity of the forfeiture can not be questioned by third parties representing a title hostile to the claim where the alleged forfeiture to co-owner was asserted.—*Becker v. Pugh,* 17 Colo. 243, 29 P. 173; *Lancaster v. Coale,* 27 Colo. App. 495, 150 P. 821. And an irregular notice may be cured by laches.—*Cassidy v. Silver King Co.,* 199 F. 100, 117 C. C. A. 640.

If a co-owner who has performed the labor sell his interest before completing forfeiture proceedings, whether his assignee can forfeit is an open question, but the language of the Turner case, that the right is limited to a co-owner who has performed the labor, would seem to be against such right.—See 31 L. D. 178.

But in *Badger Co. v. Stockton Co.,* 139 F. 838, where the performing co-owners had conveyed their claim to a corporation, taking its stock for consideration, the forfeiture perfected by the corporation was upheld.

In *Forderer v. Schmidt,* 154 F. 475, 12 Ann. Cas. 80, 84 C. C. A. 426, a friend of the party who was being advertised out offered to pay the amount due, which tender was approved by the party as soon as he learned of it. *Held,* that the tender defeated the forfeiture.

A stockholder has such an interest in the property that he may represent it and do the annual labor and he can not repudiate such labor after it is done and relocate the property.—*Wailes v. Davies,* 164 F. 397, 90 C. C. A. 385.

A party received a deed for an undivided interest in a claim as his pay for protecting the annual labor on the claim, his grantor retaining an interest in the claim. The Court held that the grantor, not his grantee, was the party who might declare forfeiture against the non-contributing co-owners.—*Knickerbocker v. Halla,* 177 F. 172, 100 C. C. A. 634.

The same case held that tender of contribution by one co-tenant for another was good. The beneficial owners are the proper parties to give notice although they have conveyed their interest in trust.—*Van Sice v. Ibex Co.,* 173 F. 895, 97 C. C. A. 587.

Certain co-owners on the Slap Jack lode were in default on their share of the annual labor for 1898. Written demand for contribution and notice of intent to forfeit were served in 1899 after they had conveyed the property, but the deed was not of record and the parties who served the notice had no knowledge of the deed. This demand in writing was immediately delivered to the grantee, who failed to pay, and the Court held the forfeiture good.—*Evalina Co. v. Yosemite Co.*, 15 Cal. App. 714, 115 P. 946.

RELOCATION OF ABANDONED CLAIMS.

Statutory Regulation of Such Relocation.

R. S. Colo. Sec. 4211.—The relocation of abandoned lode-claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property. —Sec. 16, Feb. 13, 1874.

The Old Claim Must First Be in Default.

This is the basis of the right to relocate.—*Garthe v. Hart*, 73 Cal. 541, 15 M. R. 492, 15 P. 93; *Lockhart v. Rollins*, 2 Ida. 540, 21 P. 413, 16 M. R. 16. Two locations can not legally occupy the same space at the same time.—*Porter v. Tonopah Co.*, 133 F. 756.

Admits a Prior Hostile Claim.

Where the record on its face purports to be a relocation of the claim of a stranger, this amounts to an admission that the old claim had once a legal existence, and an assertion that it has become open to forfeiture.—*Wills v. Blain*, 4 N. M. 378,

20 P. 798; *Shattuck v. Costello,* 8 Ariz. 22, 68 P. 528, 22 M. R. 136; *Golden v. Murphy,* 31 Nev. 395, 103 P. 394, 105 P. 99. The burden of proof is upon the relocator.—*Providence Co. v. Burke,* 6 Ariz. 323, 19 M. R. 625, 57 P. 641; *Zerres v. Vanina,* 134 F. 610, 150 F. 564, 80 C. C. A. 366.

The term "relocation" implies that there was a former location, and the use of the word estops the user to deny a valid prior location.—*Jackson v. Prior Hill M. Co.,* 19 S. D. 453, 104 N. W. 207; *Slothower v. Hunter,* 15 Wyo. 189, 88 P. 36.

But the rule has its limitations and in *Zeiger v. Dowdy,* 13 Ariz. 331, 114 P. 565, under the facts of the case the party was held not estopped to attack the validity of the claim he had purported to relocate.

Plaintiff in an adverse suit must show that his claim was located on the unoccupied public domain. And when he shows that there was a prior location on the ground and does not show it abandoned he fails on this point. The statement of a witness that the prior claim "was abandoned" is a mere statement of a conclusion of law.—*Lozar v. Neill,* 37 Mont. 287, 96 P. 343.

Form and Manner of Relocation.

In the relocation of abandoned claims, the party locates and records with the same particularity as in making an original location or record. The only practical distinctions are that he may, if found standing, adopt the stakes of the old claim. And his discovery shaft may be by sinking the old one deeper. He has the same rights as an original discoverer, although not in strictness a discoverer at all.—*Armstrong v. Lower,* 6 Colo. 393, 15 M. R. 631; *Pelican Co. v. Snodgrass,* 9 Colo. 339, 12 P. 206.

It has been held that a relocation can not be made on a blind working—a drift which has been run underground from the bottom of the shaft on an adjoining claim.—*Little Gunnell Co. v. Kimber,* 1 M. R. 536, Fed. Cas. No. 8402. See page 48.

The fact of improvements already on the ground does not lessen the labor required from the relocator; he must do the required amount of sinking, usually ten feet, on the old, or on a new discovery shaft; must erect a new location stake or at least change the notice on the old stake and must re-stake the claim unless he adopts exactly the lines and boundaries of the old location.

The stakes of the old claim may be adopted as the stakes of the new.—*Conway v. Hart,* 129 Cal. 480, 62 P. 44, 21 M. R. 20; *Brockbank v. Albion Co.,* 29 Utah 367, 81 P. 863; *Riverside Co. v. Hardwick,* 16 N. M. 479, 120 P. 325.

But in *Moffat v. Blue River Co.,* 33 Colo. 142, 80 P. 139, and *Miller v. Chrisman,* 140 Cal. 440, 98 Am. St. Rep. 63, 73 P. 1083, 74 P. 444, where in each instance an attempt had been made to jump a valid prior claim in the actual possession of its owner by adopting its stakes and filing a record on the boundaries set by the first party, the second attempted location was held a vain proceeding.

The relocator must set new posts or at all events must see that his boundaries are established on the ground. Where the old stakes are taken they should be marked with the new name.

A second party has a right to enter upon ground although he knows of an attempted prior location upon it, if such prior location be fatally defective.—*Brown v. Oregon Co.,* 110 F. 728, 21 M. R. 485; *Deeney v. Mineral Co.,* 11 N. M. 279, 67 P. 724, 22 M. R. 47. But if he enters as a relocator he can not assert defects in the original notice.—*Yosemite Co. v. Emerson,* 208 U. S. 25, 52 L. Ed. 374, 28 Sup. Ct. Rep. 196.

No Connection With the Old Title.

The relocator has no rights by relation to the date and priority of the title which he has destroyed by his relocation.—*Cheesman v. Shreeve,* 40 F. 789, 17 M. R. 260. There is no privity of title.—*Burke v. S. Pac. R. Co.,* 234 U. S. 670, 58 L. Ed. 1527, 34 Sup. Ct. Rep. 907.

Reference in Location Certificate to Old Title.

By statute in several States in the relocation of forfeited or abandoned claims, the location certificate is required to state if the whole or any part of the new location is located as abandoned property. In Montana and Nevada such requirement is permissive, but if relocation is made by sinking the original discovery shaft deeper, the location certificate in the latter State must give the depth and dimensions of the original shaft at date of relocation.

Cunningham v. Pirrung, 9 Ariz. 288, 80 P. 329, rightly adjudged that the Arizona Statute had no application where the prior location was not in fact a *valid* one. But it went further and said that the burden of proof was on the second location to show that the overlapped prior location was not valid. The statute was further considered in *Matko v. Daley,* 10 Ariz. 175, 85 P. 721, and in *Kinney v. Lundy,* 11 Ariz. 75, 89 P. 496, and in *Clason v. Matko,* 12 Ariz. 213, 100 P. 773, but the mischievous law was not only repealed in 1907 but in 1909 a further act was passed declaring that as to all records made while the act was in force the omission to refer to abandoned lodes should not invalidate such records.

The act requiring such recital does not require mention of a location which was never completed.—*Paragon Co. v. Stevens Co.,* 45 Wash. 59, 87 P. 1068.

All such statutes are useless and produce only embarrassment. A prospector finding old works or notices may be in entire ignorance as to whether they represent a perfected claim or an unperfected prospect. But unwise as such statutes may be, they are not in contravention of the Mining Acts of Congress.—*Clason v. Matko,* 223 U. S. 646, 56 L. Ed. 588, 32 Sup. Ct. Rep. 392, affirming *Matko v. Daley, supra.*

The case of *Copper Queen Co. v. Stratton,* 17 Ariz. 127, 149 P. 389, provides an escape by holding that a certificate of location of abandoned ground without mention of that fact, is invalid only where the original locators or parties claiming under them are asserting their interest.

Where the language and context of such statutes will possibly permit, they ought to be held directory merely, not mandatory, and thus no loss of title from non-compliance would follow.

The fact that there was a cabin on the ground located, and old notices and stakes does not show that the ground was not public domain, there being no proof of any discovery in connection with the stakes and notices.—*Cook v. Klonos,* 164 F. 529, 90 C. C. A. 403.

Re-Entry by Original Owner.

After the annual period has expired, the old claimant has still the first right; but if he has commenced work before another party enters, he must complete the full amount required with reasonable diligence, as otherwise the claim would remain forfeit.—*Honaker v. Martin,* 11 Mont. 91, 27 P. 397. And after the relocator has entered he has the right to maintain his possession against an attempted resumption by the old owner.—*Morgan v. Tillotson,* 73 Cal. 520, 15 P. 88; *McDonald v. McDonald,* 16 Ariz. 103, 144 P. 750.

In *Field v. Tanner,* 32 Colo. 278, 75 P. 916, a party attempted to relocate for failure of owner to do his annual work. After his purported relocation the owner re-entered and did the work and recovered because of defects in the relocation, to-wit: shortage in the depth of the discovery shaft.

In *Thornton v. Kaufman,* 40 Mont. 282, 135 Am. St. Rep. 618, 106 P. 361, the Little Spring Lode had become open to relocation in January, 1898, and the plaintiffs had apparently completed their location on the ground before the Little Spring owners resumed and completed work in December, 1898. But plaintiffs' record was defective and was not made good by a valid amended certificate until several years later. The court held that the resumption was in time, treating the record as a part of the location and holding that a resumption could be made at any time before the location was complete by record.

When the Original Owner Had Begun Work Before the expiration of the year, and so being not yet entirely in default was at work on December 31st—an entry by a relocator on January 1st (a Sunday) or on January 2 (a legal holiday) will not initiate a valid claim.—*McNeil v. Pace,* 3 L. D. 267; *Fee v. Durham,* 121 F. 468, 57 C. C. A. 584.

After midnight of December 31 the claim is open to relocation.—*McDonald v. McDonald,* 16 Ariz. 103, 144 P. 750.

Relocating Instead of Resuming.

In *Warnock v. De Witt,* 11 Utah 324, 40 P. 205, the Supreme Court of Utah decide in terms that an owner may allow his claim to be in default as to annual labor and then renew his monuments, file a new record and hold under such second location. The Court cites the case of *Hunt v. Patchin,* 35 F. 816, 13 Sawy. 304, as upholding such relocation. This Hunt case was a controversy between co-owners where the rights of strangers or of a hostile title were not involved and does not justify the citation.

The law requires the owner to do a certain amount of work within a certain period. It allows him the indulgence of retaining his old title if he re-enters and resumes work either during such period or during the next year before another has entered. To allow him from year to year to renew his monuments and file new records would result in wholly defeating the intent of the law. We think that there is an implied distinction between his rights and the rights of others in such a case. He has forfeited the right to locate that ground by virtue of his default in not living up to his assumed obligation to follow up his location by labor in good faith. The claim is open to relocation by all citizens barring the one whose default is the occasion of its being open and his only rights are those conferred on him by the statute to-wit: the right to resume and perform. Mr. Lindley fully coincides with these views.—2 Lind. 3d. Ed., sec. 405.

There is a legislative construction to the same effect by the insertion at the proper context of the words "open to location *by others*" in the Special Act concerning annual labor on claims in Alaska. See p. 114.

The California Act of 1909, Sec. 1426 S., forbids a relocation by an owner who has failed to do his annual labor, within three years after the date of his original location.

Relocation After Patent Applied For.

In *South End M. Co. v. Tinney,* 22 Nev. 19, 35 P. 89, a lode had applied for patent and completed its publication, but considerable delay ensued without entry and the annual labor was not kept up. During this period a relocation was made. Afterwards the applicant completed his entry, but it was held that the relocation title was valid and that the patentee took the patent in trust for the true owner, the relocator. There would seem to be no doubt that the annual labor must be kept up until actual entry, but whether other courts will go to the extreme of this holding is not to be assumed. MURPHY, C. J., dissented, as did BELKNAP, J., in part. See page 118.

In Land Office proceedings the party asserting a relocation must prove an abandonment of the original claim.—21 L. D. 219. Or the original application may be canceled for laches. See page 598.

Overlapping Senior Claim.

It has been held that the filing of amended certificate giving such bounds as include the interference of a prior survey which has failed to have its annual labor performed operates as a relocation of such abandoned overlapping area without specific mention of such being the intent of the amendment.—*Johnson v. Young,* 18 Colo. 625, 34 P. 173. See page 132.

Where the Court had decided that neither claimant to the mine had title, a relocation by one of the parties after such adjudication was held valid.—*Lauman v. Hoofer,* 37 Wash. 382, 79 P. 953.

Relocation of Abandoned Claim by Co-Tenant.

Where the several owners of a claim have allowed the annual period to expire without doing the annual labor, it has been asserted that any one of them may enter upon the ground and relocate the claim in his own name, leaving out his former co-tenants. The statute says that after the year has expired without the labor being done, the claim

"Shall be open to relocation in the same manner as if no location of the same had ever been made."—R. S. Sec. 2324.

But these words are immediately followed by a *proviso* which seems to make a distinction between the rights of the old owners and the rights of strangers, and there is an inherent distinction arising from their joint ownership. It is certain that if all the owners return to the claim their title would relate back to the original discovery; and it is also a rule of law that a tenant in common can not rightfully do any act which is subversive of his co-tenant's title, and quite as certain that if he were allowed to relocate as a stranger he must yield his prior claim absolutely, and proceed in all particulars as an entire stranger.

The question has been set at rest by repeated decisions that any relocation or attempted relocation made by a co-tenant is for the benefit of the common title and one co-tenant can not by recording in his own name oust his co-tenants.—*McCarthy v. Speed,* 11 S. D. 362, 50 L. R. A. 185, 19 M. R. 615, 77 N. W. 590; *Yarwood v. Johnson,* 29 Wash. 643, 70 P. 123, 22 M. R. 398; *Perelli v. Candiani,* 42 Or. 625, 71 P. 537.

In *Saunders v. Mackey,* 5 Mont. 523, 6 P. 361, a co-owner had agreed to see the work done; he did not do it, and afterward was a party to a relocation. The court held that the failure operated to defeat the old location, and that the relocation was valid; but intimated that in a proper action the party who had so violated his agreement would be declared to hold the title in trust. A very like case was *Doherty v. Morris,* 11 Colo. 12, 16 P. 911, where the same ruling was made and the breach of trust not considered on the

pleadings. In *Royston v. Miller,* 76 F. 50, 18 M. R. 418, it was more broadly held that a co-tenant so acting could take no advantage of his location. But it requires no decision to say that if a co-owner promise to do the assessment work and fail so to do, or if he do it and deny it and collude with a third party to relocate (as was the fact in the Morris case) whatever title he so by fraud obtains must inure to the good of the injured party. In the Morris case, the actual doing of the work was made apparent on the final trial.—17 Colo. 105, 28 P. 85.

The case of *Yarwood v. Johnson,* 29 Wash. 643, 70 Pac. 123, 22 M. R. 398, was much like the *Morris case* in its facts. Plaintiff alleged that defendant, a co-tenant, agreed to do the work and did it. Defendant had relocated, using his brother's name, as soon as the year expired. The Court held that if the work had been done the relocation was void, of course, but they further broadly and rightly held that any relocation made by a co-tenant was for the benefit of the common title. —*Clark v. Mitchell,* 35 Nev. 464, 130 P. 764, 134 P. 449.

The case of *Turner v. Sawyer,* 150 U. S. 578, 37 L. Ed. 1189, 14 Sup. Ct. Rep. 192, 17 M. R. 683, lays down the true principle applicable to the point, to-wit: that the co-tenant can not acquire and hold adversely a hostile title without allowing opportunity to co-tenant to pay his proportion of the cost and take the benefit of the same, and that perfecting patent was the purchase of such a title.—*Suessenbach v. Bank,* 5 Dak. 477, 41 N. W. 662; *Mills v. Hart,* 24 Colo. 505, 65 Am. St. Rep. 241, 52 P. 680; *Stevens v. Grand Cent. Co.,* 133 F. 28, 67 C. C. A. 284; *Delmoe v. Long,* 35 Mont. 139, 88 P. 778.

Abandonment of Undivided Interest.

Where there are two co-owners of a possessory claim and one of them fails to perform his proportion of the annual work the one who does the work may, of course, at the end of the year acquire the interest thus practically abandoned. But an actual abandonment may take place irrespective of

the annual labor. Suppose that one of the owners deliberately informs his co-tenant that he quits the ground with intent never to return or protect his interest. Undoubtedly at that moment the one who remains in possession may file a relocation certificate, in his own name, reciting the fact of abandonment and become the owner of record of the whole estate. But if he neglects so to do what is the status of the abandoned half interest? Certainly a stranger, perhaps unfriendly to the half owner in possession, could not relocate the undivided interest and force himself into the title as a co-partner. We believe that in such case the one who remains in possession becomes the owner of the abandoned half. See *O'Hanlon v. Ruby Gulch Co.,* 48 Mont. 65, 135 P. 913.

A co-owner attempting to relocate in his own name so as to oust his associates from the title does not abandon his claim to the ground nor forfeit by estoppel his undivided interest in the original claim.—*Hulst v. Doerstler,* 11 S. D. 14, 75 N. W. 270.

Other Instances of Fiduciary Relation.

The owners mortgaged their claim, abstained from doing the annual labor, and after the year elapsed, relocated. *Held,* that they could not so defeat the mortgage.—*Alexander v. Sherman,* 2 Ariz. 326, 16 P. 45, 15 M. R. 638.

The grantor by quit-claim deed is not estopped to relocate when his vendee fails subsequently to keep up his annual labor.—*Blake v. Thorne,* 2 Ariz. 347, 16 P. 270. For attempted relocation by vendor after sale see *Minah Co. v. Briscoe,* 89 F. 891, 32 C. C. A. 390.

In *McDermott M. Co. v. McDermott,* 27 Mont. 143, 69 P. 715, 22 M. R. 338, McDermott had sold the lode to a company in which he became a director. Afterwards the company failed to do its work and the claim was relocated by a third party, who conveyed it back to McDermott. There was no collusion whatever. The company had quit because it could find no pay. The Court held that upon abandonment of

the claim by failure to do the labor the ground reverted to the public domain and the relocation was an independent new title having no connection with the old one.

But an agent or other party in a fiduciary capacity can not relocate for his own benefit.—*Lockhart v. Rollins,* 2 Ida. 540 (503), 21 P. 413, 16 M. R. 16; *Co-operative Co. v. Law,* 65 Or. 250, 132 P. 521. Nor betray the property to a stranger. —*Utah Co. v. Dickert Co.,* 6 Utah 183, 21 P. 1002. Nor can a hired prospector say that what he has turned over to his outfitter is his own by a prior title.—*Fuller v. Harris,* 29 F. 814.

Lessees can not take their lessor's property by going through the form of a relocation.—*Lowry v. Silver City Co.,* 179 U. S. 196, 45 L. Ed. 151, 21 Sup. Ct. Rep. 104, 21 M. R. 113; *Brash v. White,* 3 Ariz. 212, 73 P. 445.

Where all the others have conveyed to one co-tenant for the purpose of patenting, any relocation made by him counts for the benefit of his associates, including new ground taken in by his relocation.—*Hallack v. Traber,* 23 Colo. 14, 46 P. 110, 18 M. R. 360.

Defendant agreed to relocate for plaintiff and himself. He relocated for self and two strangers. Decree for plaintiff.—*Clark v. Mitchell,* 35 Nev. 448, 130 P. 760, 134 P. 448.

A Location Made by an ex-Employee Is Not Void from the fact that his knowledge that the lode had been followed into vacant ground had been acquired while working for the owners of the adjoining patent.—*Thallman v. Thomas,* 111 F. 277, 49 C. C. A. 317, 21 M. R. 573.

RELOCATION BY OWNER.

In What Cases Owner May Relocate.

R. S. Colo. Sec. 4210.—If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act; *Provided*, That such re-location does not interfere with the existing rights of others at the time of such re-location, and no such re-location or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location. —Sec. 13, Feb. 13, 1874.

This section provides an escape from the consequences of loose and careless records; it also gives narrow claims the opportunity to take the full width allowed by the later law; and further, in case a lode is found to be not contained in the original boundaries, it allows the error to be corrected. All former rights are secured with the new privileges, and greater certainty obtained under the relocation.

In a relocation under this section the name of the lode should not ordinarily be changed, and the certificate should show that it is a relocation, and of what lode.

AMENDED OR RELOCATION CERTIFICATE.

KNOW ALL MEN BY THESE PRESENTS, That I, *Andrew J. Hughes*, of the City and County of *Denver*, State of Colorado, claim by right of re-location, and this amended certificate of location, *fifteen hundred* feet, linear and horizontal measurement, on the *Kentucky* Lode, along the vein thereof, with all its dips, variations and angles, together with *one hundred and fifty* feet in width on each side of the middle of said vein at the surface; and all veins, lodes, ledges and surface ground within the lines of said claim; 750 feet on said lode running *north* 10 degrees *east* from the center of the discovery shaft, and 750 feet running *south* 10 degrees *west* from said center of discovery shaft; said discovery shaft being situate upon said lode, within the lines of said claim, in *Silver Cliff*

Mining District, County of *Custer*, State of Colorado. Said claim is bounded and described as follows: Beginning at corner No. 1 *(etc., describe as in original location or according to the new lines, if changed, and conclude as follows):*

Being the same lode originally located on the first day of May, A. D. 1894, and recorded on the first day of June, A. D. 1894, in *book 7, page 11*, in the office of the recorder of said county. This further certificate of location is made without waiver of any previous rights, but to correct any error in prior location or record, to secure all abandoned overlapping claims, and to secure all the benefits of section 4210 of the Revised Statutes of Colorado. Date of relocation, January 7, 1908. Date of amended certificate, January 8, 1908. ANDREW J. HUGHES.

Nearly all the mining States have adopted statutes similar to the Colorado Act providing for the relocation of abandoned claims, for relocation by the owner, or the filing of amended certificate of location.

But they are only declaratory of the right which any claimant has without the aid of any such statute to amend his own publication of claim.—*Thompson v. Spray*, 72 Cal. 528, 14 P. 182.

Same Particularity As in Original Location.

The discovery shaft, side and corner posts should be found on the ground before any second record is made, and if the amendment changes the boundaries or is made on account of any previous mistake or irregularity in any act of location the same should be rectified upon the ground before recording. The description in the new certificate will, of course, correspond to the new boundaries.

A new location stake should also be erected at the discovery, if the length or width called for on the original stake is altered, and especially if the name of the claim is changed. In other instances the old stake should be considered as answering all purposes of notice the same as the old discovery shaft which does not need to be sunk to any greater depth if it has already the legal depth.—*Tonopah Co. v. Tonopah Co.*, 125 F. 390; *Becker v. Pugh*, 17 Colo. 243, 246, 29 P. 173. In fact, no change, whatever, upon the ground

is necessary if the original location was perfectly regular, and the only idea in relocating or in filing the amended certificate is to formally appropriate abandoned interferences or to correct mistakes in the record.

When admitted in evidence both the original and relocation certificates are to be construed together.—*Duncan v. Fulton,* 15 Colo. App. 140, 61 P. 244, 20 M. R. 522.

The Intent of the Act Is:

First, to provide a recognized mode of relieving from the consequences of clerical and other mistakes; *second,* to give to old locations the benefit of the additional width allowed under the A. C. of 1872, and *third,* to allow change of bounds, where the old survey was found to vary from the strike of the lode.—*Seymour v. Fisher,* 16 Colo. 189, 27 P. 240.

An additional or amended location certificate may be filed on old 3,000-foot claims for mere purpose of more specific description, but such claim can not increase its width and at the same time retain its old length.

A relocation certificate is good for all purposes, although it does not state that it is filed for the specific purpose material to the suit. It will take in abandoned overlap although intention so to do is not expressed on its face.—*Carlin v. Freeman,* 19 Colo. App. 334, 75 P. 26; *Tonopah Co. v. Tonopah Co.,* 125 F. 390.

New Discovery Shaft.

Where a discovery is made within the lines of an older claim, or the locator suffers his discovery to be patented by a hostile location, he may make a valid relocation of that part of the claim which remains to him upon a new discovery made on clear ground.—*Erwin v. Perego,* 93 F. 609, 35 C. C. A. 482; *Silver City Co. v. Lowry,* 19 Utah 334, 57 P. 11, 20 M. R. 55. Affirmed without discussion of this point in *Lowry v. S. C. Co.,* 179 U. S. 196, 45 L. Ed. 151, 21 Sup. Ct. Rep. 104, 21 M. R. 113.

In *Treasury Co. v. Boss,* 32 Colo. 27, 105 Am. St. Rep. 60, 74 P. 888, where a new discovery shaft had been sunk to get clear of patented ground on which the original discovery had been made, the claim was held valid, although no amended location certificate had been filed and no notice posted at the new discovery. As to the latter point the case was followed in *McMillen v. Ferrum Co.,* 32 Colo. 38, 105 Am. St. Rep. 64, 74 P. 461.

But the ruling that such shifting of discovery shaft without a second record is good, is a dangerous precedent to rely on.

Where a party shifts his discovery shaft and relocates upon such new discovery shaft it is no abandonment of his rights under the first location.—*King Solomon Co. v. Mary Verna Co.,* 22 Colo. App. 528, 127 P. 130.

To Reform End Lines.

A relocation may be made so as to make the end lines parallel and place the lode in position to claim extralateral rights.—*Tyler Co. v. Last Chance Co.,* 71 F. 848, 18 M. R. 303.

Changing Boundaries.

A claim may be swung at right angles if it takes up no ground to which rights have intervened.—*Duncan v. Fulton,* 15 Colo. App. 140, 61 P. 244, 20 M. R. 522.

Distinction Between Relocation and Amended Certificate.

In strictness there is a relocation only when some change is made upon the ground, as by changing length, width or boundaries; perhaps also when overlapping abandoned ground is taken. The certificate filed to show such change is a relocation certificate. But if the error is in the papers only, as by a misleading or too vague description, there is no relocation, but only the filing of an amended location certificate. But the terms are not always used with exactness even by the legal profession, all such papers as well as acts being called reloca-

tions or relocation certificates, and a misuse of the terms is not generally material.—*Cheesman v. Shreeve,* 40 F. 789, 17 M. R. 260.

An amended location certificate may be filed after suit commenced.—*Strepey v. Stark,* 7 Colo. 614, 5 P. 111, 17 M. R. 28. And in *Butte Co. v. Barker,* 35 Mont. 327, 89 P. 304, 90 P. 177, it was admitted in evidence though not filed till after the trial had begun. A relocation by new parties may be made to protect the original locators.—*U. S. v. McCutchen,* 217 F. 650.

Relation Back and Intervening Claim.

It relates back, where adverse rights have not intervened, to the date of the original location.—*McGinnis v. Egbert,* 8 Colo. 41, 15 M. R. 329, 5 P. 652; *Strepey v. Stark, supra; Las Vegas Co. v. Summerfield,* 35 Nev. 229, 129 P. 303.

In the case of *McEvoy v. Hyman,* 25 F. 596, 15 M. R. 397, and in *Craig v. Thompson,* 10 Colo. 517, 16 P. 24, the amended record was allowed in evidence and to affect and cut out intervening claimants. In the latter case the intervening claimant was treated as a trespasser who could not initiate rights; in the former the original certificate was treated as a defective but not as a void instrument.

The same ruling was followed in *Cheesman v. Shreeve,* 40 F. 787, 17 M. R. 260, stating in terms that an amended record related back to the date of the original record.

In the Colorado Statute above printed there is an express saving of intervening rights. But such exception is superfluous because vested rights save themselves. There is no doubt that an amended record, the land office entry, the patent, every successive incident toward perfecting title, relates back to the first step taken toward obtaining such title. But notwithstanding what might be gathered from the wording of the decisions to such effect taken alone, they are to be read in connection with the fact that the doctrine of relation can not be invoked to work injustice to third parties.—*Gibson v. Chouteau,* 13 Wall. 101, 20 L. Ed. 534. And if a location or location

certificate was so defective as to be void, or so irregular that it allowed strangers to become legal locators of the same ground, in such cases an amended certificate or a relocation will not relate back so as to cut out such intervening locators.—*Hall v. Arnott,* 80 Cal. 348, 22 P. 200; *Jordan v. Schuerman,* 6 Ariz. 79, 53 P. 579; *Deeney v. Mineral Co.,* 11 N. M. 279, 67 P. 724, 22 M. R. 47; *Morrison v. Regan,* 8 Ida. 291, 67 P. 956, 22 M. R. 69, *Brown v. Oregon Co.,* 110 F. 728, 21 M. R. 485.

New rights can not be acquired by relocation inconsistent with the intervening rights of others.—*Bunker Hill Co. v. Empire S. Co.,* 134 F. 268; *Butte Co. v. Barker,* 35 Mont. 327, 89 P. 302, 90 P. 177; *Ware v. White,* 81 Ark. 220, 108 S. W. 832; *Bakersfield Co. in re,* 39 L. D. 460; *Giberson v. Tuolumne Co.,* 41 Mont. 396, 109 P. 974. Nevertheless it was in effect so held in *Copper Queen Co. v. Stratton,* 17 Ariz. 127, 149 P. 389.

Where Original Record Was Voidable Only.

In *Moyle v. Bullene,* 7 Colo. App. 308, 44 P. 69, the very tenable distinction is made that where the original location certificate was so "defective as to absolutely fail to comply with the statutory requirements" it was void and the amended record would not relate back; but if the original paper was only lacking in technical detail the two should be construed as of the date of the first, and both construed together according to the doctrine of relation. But in *Frisholm v. Fitzgerald,* 25 Colo. 290, 53 P. 1109, where a record contained no reference at all to a natural object or permanent monument, and was not only constructively void for non-compliance with the Congressional Act, but was declared void in terms by the Colorado Statute, the relocation was held to relate back to the original record and to cut out an intervening title.

The opinion in the case is peculiar in this, that it is the personal view of one judge, and both of his associates refused to concur. It is not the opinion of a Court, and therefore has no obligation as a precedent binding the *nisi prius* courts of that State. Nothing in the case or the reasoning on which it

is based shakes our conclusions as stated in the preceding paragraph, and we consider untenable the proposition that any amendment can cure a void record as against an intervening location.

An amended notice relates back to the original notwithstanding intervening locations if made to cure obvious defects in the original notice without including any new ground.—*Gobert v. Butterfield,* 23 Cal. App. 1, 136 P. 516.

Will Not Cure Want of Discovery.

In most of the cases above cited the point was one of objection to the form or contents of the original location certificate—that is, to the papers in the case—not the merits of the discovery or the location proper, but in *Beals v. Cone,* 27 Colo. 473, 83 Am. St. Rep. 92, 62 P. 949, 20 M. R. 591, there was no discovery when the original record was made. The second claimant had a valid discovery before the first had any discovery, and the Court held that the intervening claimant took the ground and that the subsequent discovery on the prior claim could have no relation back.

An amended location made by a party who has parted with his title will not be recognized.—*Gray Copper Lode,* 18 L. D. 536.

The Official Survey Corrects the Errors of the Original

location and its stakes and corners need not be identified with the locator's survey.—*Howeth v. Sullenger,* 113 Cal. 547, 45 P. 841.

Changing Names of Locators on Notices—Transfers Before Record.

After a record is made based on a valid location, the possessory title becomes perfect, subject to the conditions of a possessory title.—*Gwillim v. Donnellan,* 115 U. S. 45, 29 L. Ed. 348, 5 Sup. Ct. Rep. 1110, 15 M. R. 482. But before record it is

not unusual for prospectors to settle their rights among themselves by the primitive but practical method of adding or erasing names from the discovery notice. Names can not be so erased without the assent of the parties to the destruction of the right vested by putting them there in the first instance.—*Thompson v. Spray,* 72 Cal. 528, 14 P. 182. But this is matter of complaint only by the parties injured, and strangers to the title can not take advantage of such things.—*Thompson v. Spray, supra; Omar v. Soper,* 11 Colo. 380, 7 Am. St. Rep. 246, 15 M. R. 496, 18 P. 443.

In *Doe v. Waterloo Co.,* 70 F. 455, 17 C. C. A. 190, 18 M. R. 265, it was held that a verbal transfer of an interest in a title not yet recorded was valid and that the new associate taken in by the prospector could complete the location for their joint benefit.

Where new parties become transferees of an uncompleted or an irregularly completed location they have the right to perfect the record in their own names.—*Miller v. Chrisman,* 140 Cal. 440, 98 Am. St. Rep. 63, 73 P. 1083, 74 P. 444; *Tonopah Co. v. Tonopah Co.,* 125 F. 389.

Change of Name of Lode.

It is not infrequent by filing amended location certificate and posting amended notice on the claim, to change the name of the lode.—*Butte Co. v. Barker,* 35 Mont. 327, 89 P. 302, 90 P. 177. Where names such as decency forbids have been placed on record the land office has declined to patent the lode by name. In such instances, or even where the name is objectionable only for sentimental reasons, where all parties interested consent, a change of name is certainly legal.—*Seymour v. Fisher,* 16 Colo. 188, 197, 27 P. 240. But when done, as it has been, in instances, preparatory to application for patent with intent to mislead and forestall an anticipated adverse claim, or preparatory to intended forfeiture publication, there could be no stronger circumstance from which to draw the inference of fraud.

Defendants held valid locations on certain lode claims for several years before 1907 and did their work every year except 1907. On January 1, 1908, they posted location notices stating that the same were on abandoned ground and recorded such notices, changing the names of the lodes but keeping the same boundaries and kept at work during 1908, 1909 and 1910.

Plaintiffs entered and attempted to locate in 1910. The Court held that, notwithstanding the statement in defendants' notices that they were relocating abandoned ground, their continued possession negatived the intention to abandon and that they held under their original title.—*Peachy v. Gaddis,* 14 Ariz. 214, 127 P. 739.

Double Record on Same Ground.

The Edith lode was located 1,200 feet in length. Discovering that there was 200 feet of vacant ground, the Edith owners made a new location 1,400 feet long, calling it the Kirby lode. The Court held that the second location was a relocation of the first and a valid claim.—*Shoshone Co. v. Rutter,* 87 F. 801, 31 C. C. A. 223, 19 M. R. 356.

UNITED STATES PATENT.

Policy of the Government As to Mineral Lands.

The general policy of the United States has been to pass the fee simple title to its lands to the ultimate purchaser, but to encourage offers to purchase from settlers and improvers only. To extend this policy into a system of land tenure it first gives a general license to prospect and discover mineral value—passing then to the discoverer the sole right to possess and use, and finally grants the title in fee after due proof of occupation and improvement.

A temporary departure from this rule in taking an impolitic royalty from the miner, based on Acts of Congress as early as 1807, was made in the attempt to lease the lead and copper lands on the Mississippi and Lake Superior.—*Lorimer v. Lewis*, 1 Morris (Iowa), 253, 39 Am. Dec. 461, 12 M. R. 437. But a return to the leasing system has been made in later legislation on a much larger scale as to coal and oil, especially in Alaska.

The government had no occasion to deal with lands containing the royal metals until the acquisition of California, upon which event, instead of adopting any system of legislation, it merely preserved the mineral lands from sale and acquiesced in the asserted rights of the prospector and miner until 1866.

In that year was passed the first of what are known as the Mining Acts, now embraced in Title 32 of the Revised Statutes. This was followed by the Acts of 1870 and 1872, with other slight amendments.

The ultimate intent of these Acts is to pass the fee simple to the discoverer of a mine, or his grantees, after a certain amount of development has been made upon the claim and until final entry the locator holds by a possessory title.

Procession of Title.

Title becomes initiate by discovery; the possessory title is complete upon location and record, and is maintained from year to year by compliance with the condition of annual labor. The occupant after $500 expenditure has the right to buy the land from the United States by entry thereof in the local land office. This entry entitles him to receive a patent which issues later from the general land office at Washington.

Title After Entry and Before Patent.

After entry in the land office, although the title is still technically equitable, it amounts practically to the legal or fee simple, because:

First—The receiver's receipt for the purchase money is evidence of title in the purchaser, with or without statute to such effect.—*Last Chance Co. v. Tyler Co.*, 61 F. 558, 9 C. C. A. 613.

Second—The subsequent issue of the patent follows as a mere ministerial act, except where some irregularity has occurred in the application, or a protest delays or prevents issue.

Third—Before entry is allowed the time for the assertion of any adverse title must have elapsed.

Fourth—Upon the issuance of patent, the fee passes to the purchaser, and the title relates back in all cases to the entry at least.

Choice of Land Systems.

It was in the power of the United States to have adopted any one of several different systems in the disposition of its mineral lands; but at some stage, under any system, a decision of the conflicting equities between the adverse claimants would have to be reached.

First—A system based on rectangular surveys, upon which a block book could be platted, which would, on its face, establish the priority of any assertion of title to the block representing any certain mining claim, the same as adopted in the disposition of agricultural lands by quarter-sections.

Second—A system under which every applicant would receive a patent upon an *ex parte* proceeding without regard to priority or adverse rights, leaving the several patentees to contest their equities in the courts upon an equal footing analogous to the old land system of Virginia.

Third—A system based on making the proceeding to obtain patent a proceeding *in rem*, compelling the applicant to give notice of his application and forcing an adjudication of all adverse titles before the issue of the patent, which was the Pennsylvania system.

The last is the system adopted by the government, by the original Act of 1866, and continued in all the amendments.

Priorities Adjudicated Before Patent Issues.

The result follows that upon the issue of a patent the patentee has got rid of all assertions of title hostile to his own title, and all supposed prior discoveries and locations which might have interfered with him are lost, by failure to assert them as adverse claims, or to prove them in the ejectment suit brought in support of the adverse claim.—*Silver Bow Co. v. Clark,* 5 Mont. 378, 5 P. 570; *Raunheim v. Dahl,* 6 Mont. 167, 9 P. 892; *Kannaugh v. Quartette Co.,* 16 Colo. 341, 27 P. 245; *Seymour v. Fisher,* 16 Colo. 188, 197, 27 P. 240.

The publication required by the Mining Acts "is in effect a summons to all persons whose interests may be affected by the issuance of a patent," to appear and file their adverse claims.—*Wolfley v. Lebanon Co.,* 4 Colo. 112, 13 M. R. 282; *Wight v. Dubois,* 21 F. 693.

Poncia v. Eagle is a case where an adverse claimant whose suit had been dismissed was held to have equities entitled to protection. There had been a stipulation on the faith of which his adverse proceedings had been dropped.—28 Ida. 60, 152 P. 208.

The Land Department Issues the First Patent to the First

applicant, without regard to the priority of his possessory title, and in case the senior possessory title fail to assert its seniority by filing and prosecuting its adverse claim, the seniority of such possessory title is lost, and yields to the title which the government issues to the applicant for patent.

Exclusion from Public Domain.

The Surveyor General shows all conflicts with previous surveys upon the approved plat, and notes all previous official surveys in the approved field notes, but only approves as to the

correctness of the survey, not excluding the area of priorities, if their inclusion is asked. The register of the land office, when application for patent is made, is supposed to except all previous surveys as noted in the approved field notes (where such surveys have been followed by applications for patent), in his notice for publication, which is the first period at which the officers of the United States recognize the exclusion of the claim from the mass of the public domain. From this point the claim so first excluded must, under the practice of the land office, be recognized by all subsequent applicants for survey as prior in point of time, and they are compelled to except from their applications such previously approved surveys, so duly followed by filing their applications.

Under former practice exclusion took place in the office of the Surveyor General. But the Surveyor General now approves everything within the exterior boundaries as clear ground, to the applicant for survey, if he so request, leaving to the land office the duty of excepting from his entry and patent, prior patents and applications for patent.

In former editions the word "segregation" was used instead of "exclusion," but the usage of the department is to treat "segregation" as the separation of one class of claims from another class of claims, as, for instance, when a lode survey is cut out of a homestead entry, and the word "exclusion" refers to such action as temporarily or permanently removes a tract from the unoccupied public domain on the official corrected plat.

Under the Act of 1866 the survey was not approved until after the application had been otherwise perfected.

The Doctrine of Relation.

Where successive steps are essential to perfect title, as discovery, location, record, application for patent, entry and finally patent, and during the progress of the time required to complete the series two hostile parties have taken some or all of these steps towards obtaining title to the same ground—the

doctrine of relation may become material to determine between them the question of priority.

When discovery is followed by location and record within the proper or fixed periods allowed and entry and patent follow in due course, the title is considered in general and in theory to relate back to discovery. This theoretical relation is, of course, of no materiality unless a second title has intervened, and if a second title has intervened at a period when the first title was in default the doctrine of relation does not apply.

A patent always relates back to date of entry at least. But a senior entry on a junior application will not be prior to the entry of the senior application when made, because relation will carry the junior entry back to the date of its senior application. All three items, the application, the entry and the patent, are merely successive steps, and the latter two relate to the date of the first.

Many loose assertions are found in the cases on this topic of relation, not taking into consideration the conditions above attempted to be pointed out. If, in all cases, a patent related back to discovery, a patent of today on a location of 1866 would supplant a patent to the same ground issued twenty years ago. Relation never applies either to defeat a statute or to work manifest injustice.

In *Hickey v. Anaconda Co.*, 33 Mont. 46, 81 P. 806, the Montana Supreme Court refused to allow the law of relation to carry the title of the Nipper lode patent back to the date of its location certificate, a paper so defective as to be void.

The different classes of claims to which it applies necessitate certain distinctions.

Where Both Are Possessory, the First Discovery Followed up by completed location within the allowed period becomes a title calling back to date of discovery, and by the doctrine of relation will cut out a possessory title completed sooner though initiated later than the first discovery.—*Patterson v. Hitch-*

cock, 3 Colo. 533, 5 M. R. 542. For instance, if A discover a lode on January 1st in a State which gives sixty days to sink discovery and thirty days more to record, and he completes sinking on the sixtieth day and records on the ninetieth day, he has an older and better title than B, who discovers the same vein on January 10th, but promptly completes his sinking by the 20th and surveys and records on the 21st. B is prior to A in point of time on every incident of location except discovery, but A, not exceeding his statutory limit of time, is not in default on any item of location, clearly calls back to January 1st and has the older and better possessory title.

If, on the other hand, A allows any of his periods to expire without doing the act for which the law allowed a certain time and the second title becomes initiate during such period of lapse, the doctrine of relation does not apply and B has the older and better title.

Patented Claims—Failure to Adverse.

Where two claims overlap or cover the same ground, and one of them applies for patent, the other must adverse and maintain its adverse, otherwise it loses all pretense to priority; and if it fails so to do and afterwards goes to patent on its own application, all claims to priority are gone and it can not appeal to the doctrine of relation to defeat the express terms of the statute.—*Eureka Co. v. Richmond Co.,* Fed. Cas. No. 4548, 4 Sawy. 302, 9 M. R. 578.

The above paragraph refers only to cases where there is a surface conflict. For if there be no surface conflict there can be no adverse and the rule has no application.—*Empire Co. v. Bunker Hill Co.,* 114 F. 420, 52 C. C. A. 222, 22 M. R. 132.

Thus, in the class of cases where two veins parallel on surface, dip towards each other and are found to unite going down, the doctrine of relation has its full application and title will be carried back to the date of location, and, if necessary, to the date of discovery so as to give the united vein to the title first initiated and perfected without default or lapse.

The patent of an overlap to the junior locator conveys the title and defeats the senior location, but does not determine as a fact the priority of the two claims.—*Clark Montana Co. v. Butte Co.*, 233 F. 548.

Applications Pending at Same Time.

The question may also arise between two claimants who are applying for patent at the same time.

This proceeding begins by an order for survey, which is followed by the survey in the field and by its approval in the Surveyor General's office. This approved survey or the date of its approval determines no priorities. It is only when the papers reach the land office that a survey becomes "prior" by its right to be excluded from later applications, and the applicant whose area is excluded in the land office becomes the party who must adverse in order to maintain such priority of title as he may claim.—26 L. D. 81, 29 *Id.* 226. If he fail to adverse, his patent when obtained will show the ground excluded in favor of the party who was first to file his "application for patent" (form M, p. 560), and even if he be the first to enter and pay and obtain the receiver's receipt, the entry when made of the survey which first filed its "application" will relate back to the date of such filing.

Double Patent Under Different Systems.

It may become material, also, in any case where two parties hold patents for the same ground, which have been obtained under different *ex parte* proceedings where there was no opportunity to adverse and the proceeding therefore not a proceeding *in rem*, as in a conflict between school land and a mining claim.—*Heydenfeldt v. Daney Co.*, 93 U. S. 634, 23 L. Ed. 995, 13 M. R. 204. Or between a lode and a town site.—*Talbott v. King*, 6 Mont. 76, 9 P. 434; *Silver Bow Co. v. Clark*, 5 Mont. 378, 5 P. 570; *The Smokehouse Lode*, 6 Mont. 397, 12 P. 858. Or where the same ground has been patented to one as a lode, to another as a placer.—*Iron S. Co. v. Campbell*, 135 U. S. 286, 34 L. Ed. 155, 10 Sup. Ct. Rep. 765, 16 M. R. 218.

Excluded Area.

It is the practice of the department to exclude from each later patent all claims which have land office priority, and the junior patentee has no right under his patent to follow any vein on its strike through the area reserved in favor of such excluded survey.—*Montana Co. v. Boston Co.*, 20 Mont. 336, 51 P. 159, 19 M. R. 186. And where such exclusion plainly appears, and, adhering strictly to the ruling in the case just cited, it can hardly be said that there are two grants of the same thing, although each lode patent is issued on the theory that it covers so many lineal feet on the vein. Where, owing to error in the surveys, there is in fact no conflict, the excluded area belongs to the patentee.—45 L. D. 10.

Where a conflicting area has been allowed to go to a senior patent it does not make that patent senior except as to the overlap.—*U. S. M. Co. v. Lawson*, 134 F. 769, 67 C. C. A. 587.

The Nature of the Merger of the Possessory

into the patented title is learnedly discussed in *Black v. Elkhorn Co.*, 49 F. 549; affirmed 52 F. 859, 3 C. C. A. 312, 163 U. S. 445, 41 L. Ed. 221, 16 Sup. Ct. Rep. 1101, 18 M. R. 375.

What It Conveys.

A patent covers blind lodes within and underneath its lines.—*Calhoun Co. v. Ajax Co.*, 27 Colo. 1, 59 P. 608, 83 Am. St. Rep. 17, 50 L. R. A. 209, 20 M. R. 192; affirmed 182 U. S. 499, 45 L. Ed. 1200, 21 Sup. Ct. Rep. 885, 21 M. R. 381. The surface, and the right to follow on the dip veins apexing within its lines.—*Empire Co. v. Bunker Hill Co.*, 114 F. 420, 52 C. C. A. 222, 22 M. R. 132. The surface although the vein has left the side lines.—*Argonaut Co. v. Turner*, 23 Colo. 400, 48 P. 685, 58 Am. St. Rep. 245, 18 M. R. 556.

An ore body within the patented lines presumptively belongs to the owner of the patent.—*Stewart Co. v. Bourne*, 218 F. 327, 134 C. C. A. 123; affirmed *Stewart Co. v. Ontario Co.*, 237 U. S. 350, 59 L. Ed. 989, 35 Sup. Ct. Rep. 610.

Conclusiveness As to Title.

A patent is conclusive in all suits at law (1) when valid on its face and (2) when not issued in opposition to law. In any such case it is a final disposition of the legal title and must be recognized by courts and allowed such effect.—*Boggs v. Merced Co.*, 14 Cal. 279, 10 M. R. 334. It is also conclusive as to the bounds or limits of the claim.—*Waterloo Co. v. Doe*, 56 F. 685, 17 M. R. 586. Patent is conclusive evidence that there had been a sufficient location notice.—*Chambers v. Jones*, 17 Mont. 156, 42 P. 758; that a valid discovery and location had been made; that the required expenditure showed on the ground and that the patentee is owner of all veins enclosed by his survey.—*Carson City Co. v. North Star Co.*, 83 F. 658, 28 C. C. A. 333, 19 M. R. 118. It is a conclusive presumption that there is the apex of a vein within the patented ground.—*Gr. Central M. Co. v. Mammoth Co.*, 29 Utah 490, 83 P. 648, 668.

It is conclusive evidence of a prior location as to all claims having surface conflicts not excluded from its area.—*Empire Co. v. Bunker Hill Co.*, 114 F. 420, 52 C. C. A. 222, 22 M. R. 132. And of a valid discovery.—*Calhoun Co. v. Ajax Co.*, 182 U. S. 499, 45 L. Ed. 1200, 21 Sup. Ct. Rep. 885, 21 M. R. 381; *Stewart Co. v. Bourne*, 218 F. 327, 134 C. C. A. 123.

The patent is not only conclusive evidence that there was mineral discovered before it issued but that all State as well as federal prerequisites were complied with.—*Work M. Co. v. Doctor Jack Pot M. Co.*, 194 F. 620, 114 C. C. A. 392.

But the case of *Uinta Co. v. Creede Co.*, 119 F. 164, 22 M. R. 445, makes the distinction that where a hostile claim has had no opportunity to contest the issue of the patent, as, for instance, where a lode has been patented across the line of a tunnel before it was cut in the tunnel, the patent is not conclusive evidence of a valid discovery as against the asserted rights of such tunnel.

The facts were these: The lode was located before the tunnel site was located. After both locations the lode was patented. The tunnel owner on reaching the claim, which crossed

the line of the tunnel, had no right to cross, if, in fact, a valid location of the lode claim had been made before the tunnel was started.

The tunnel owners claimed that there was in fact no valid discovery on the lode claim before the location of the tunnel site. The lode owners contended that the patent was conclusive evidence that it had a legal discovery at the time claimed in its location certificate, but the Appellate Court sustained the reasoning of the Circuit Court of Appeals and held in favor of the tunnel site.—196 U. S. 337, 49 L. Ed. 501, 25 Sup. Ct. Rep. 266. Followed on like facts in *Uinta Co. v. Ajax Co.*, 141 F. 563, 73 C. C. A. 35.

Conclusiveness As to Mineral Character of Land.

See p. 252.

Patent—When Void.

If not valid on its face or if issued in spite of a law which forbade its issuance, it is an inoperative paper, and may be passed upon and excluded in a suit at law—because it is *void.*—*Kahn v. Old Telegraph Co.*, 2 Utah 174, 11 M. R. 646; *St. Louis Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875, 11 M. R. 673; *Garrard v. S. P. Mines*, 82 F. 578. A patent for a lode in excess of legal width has been held void.—*Lakin v. Dolly*, 53 F. 333; *Lakin v. Roberts*, 54 F. 461, 4 C. C. A. 438; but otherwise as to patent perfecting locations made prior to the Act of 1872.—*Carson City Co. v. North Star Co., supra.*

Patent—When Voidable.

But if only irregular, or obtained by fraud, or issued to the wrong party, it is only *voidable*, and must, until set aside, or a trust declared thereon, be taken as conclusive both at law and in equity.—*Silver Bow Co. v. Clark*, 5 Mont. 378, 5 P. 570; *Rose v. Richmond Co.*, 17 Nev. 26, 27 P. 1105.

A patent is not void as to the excess from the fact that it conveys more than 300 feet from the center of the lode.—

Peabody Co. v. Gold Hill Co., 97 F. 657, 111 F. 818, 49 C. C. A. 637, 21 M. R. 591.

The Land Office Can Not Insert Conditions or Exceptions

not authorized by law, in a patent.—*Deffeback v. Hawke*, 115 U. S. 392, 29 L. Ed. 423, 6 Sup. Ct. Rep. 95; *Clary v. Hazlitt*, 67 Cal. 286, 7 P. 701; *Talbott v. King*, 6 Mont. 76, 9 P. 434; *Silver Bow Co. v. Clark, supra; Davis v. Weibbold*, 139 U. S. 527, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628.

All Presumptions in Its Favor.

When a patent is judicially attacked all presumptions are indulged to its favor. It will be assumed that everything was done which the law required to be done, and mere irregularities, though proved, will not impeach it.—*U. S. v. Marshall Co.*, 129 U. S. 579, 32 L. Ed. 734, 9 Sup. Ct. Rep. 343, 16 M. R. 205; *U. S. v. Iron-Silver Co.*, 128 U. S. 673, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195; *Galbraith v. Shasta Co.*, 143 Cal. 94, 76 P. 901.

Placer Patented As Lode Claim.

It is no fraud upon the government that placer ground has been patented as a lode claim at a greater price per acre. —*Peabody Co. v. Gold Hill Co.*, 111 F. 818, 49 C. C. A. 637, 21 M. R. 591.

Suits by U. S. to Annul Patent.

When obtained by fraud against the United States, as where mineral land has been entered as agricultural, or upon false representations, the false representations being material, the application to set aside being made without too great delay and innocent buyers being to a certain extent protected—it may be set aside at the suit of the United States. This requires action by the Attorney General, who directs the U. S. District Attorney to bring suit in the local Federal Court.—

Boggs v. Merced Co., 14 Cal. 279, 10 M. R. 334; *Mullan v. U. S.* 118 U. S. 271, 30 L. Ed. 170, 6 Sup. Ct. Rep. 1041; *U. S. v. Iron-Silver Co.*, 128 U. S. 673, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195.

Such action lies where the patent has issued through fraud, mistake or erroneous views of law by the Land Department.—*U. S. v. Winona Co.*, 67 F. 948, 15 C. C. A. 96. See STATUTE OF LIMITATIONS.

A patent will not be set aside for fraud where the property has passed into the hands of a *bona fide* purchaser without notice.—*Colo. C. & I. Co. v. U. S.*, 123 U. S. 307, 31 L. Ed. 182, 8 Sup. Ct. Rep. 131; *U. S. v. Clark*, 138 F. 294, 70 C. C. A. 584.

Degree of Proof.

In suits to set aside a patent or to declare a trust in favor of another claimant, the proof to overcome the presumptions in favor of the patent must be clear and convincing.—*U. S. v. King*, 83 F. 188, 27 C. C. A. 509; *Thallman v. Thomas*, 111 F. 277, 49 C. C. A. 317, 21 M. R. 573.

It will not be reformed in equity to correct a misdescription where the monuments can not be reset with certainty.—*Thallman v. Thomas*, 102 F. 935, *Affirmed* 111 F. 277, 49 C. C. A. 317, 21 M. R. 573.

Where Issued to the Wrong Party in Fraud of the Right of the real owner, the suit is not to set the patent aside, but to have it declared that the party to whom it issued holds in trust, and to compel by decree of court a conveyance from him to the party to whom it should have issued.—*Burke v. S. Pac. R. Co.*, 234 U. S. 670, 58 L. Ed. 1527, 34 S. Ct. Rep. 907.

The Federal Courts have jurisdiction of such cases independent of the citizenship of the parties.—*Cates v. Producers Co.*, 96 F. 7.

Such a suit can not be maintained on mere priority of title, for here an adverse claim should have been filed, but only on the allegation of breach of trust or in like instances.

A party who had at the time of its issue no claim of title to the land patented has no standing to attack it for fraud practiced on the land department.—*Peabody Co. v. Gold Hill Co.*, 111 F. 817, 49 C. C. A. 637; 21 M. R. 591.

Irrevocable—No Second Patent.

After a patent has issued, the land office has no power to cancel or recall the same nor to issue a second patent for the same land to another party.—*Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848.

Wrong Description.

Where, by reason of erroneous survey or other mistake, the patent describes other land than that actually applied for, it may be corrected upon surrender of the patent.—22 L. D. 101, 28 *Id.* 307, 29 *Id.* 160, 36 *Id.* 243, 44 *Id.* 173.

The courses and distances in the field notes and in the patent are not conclusive of the true position of the monuments. —*Gr. Cent. M. Co. v. Mammoth Co.*, 36 Utah 364, Ann. Cas. 1912A, 254, 104 P. 573.

Title by Receiver's Receipt.

After valid entry its holder has a vested estate, and the land has ceased to be public domain.—*Rader v. Allen*, 27 Or. 344, 41 P. 154; *McKnight v. El Paso Co.*, 16 N. M. 721, Ann. Cas. 1912D, 1309, 120 P. 694.

Canceling Receiver's Receipt.

The land office has the power to cancel the receiver's receipt and all preliminary proceedings, and frequently exercises this power in case of irregularities in the application. But the cancellation of the receiver's receipt does not make the ground open to relocation. *McKnight v. El Paso Co., supra.*

Land Office Adjudications.

When the question of priority between patentees has been contested and adjudicated in the land office the findings

within its jurisdiction on matters of fact or mixed law and fact, in the absence of fraud or imposition, are accepted by the courts as conclusive.—*Jeffords v. Hine*, 2 Ariz. 162, 11 P. 351, 15 M. R. 575; *Aurora Hill Co. v. 85 Co.*, 34 F. 515, 12 Sawy. 355, 15 M. R. 581; *McKnight v. El Paso Co., supra.*

Squatters' Rights.

A prior occupant of public land who takes no steps to perfect his title and allows it to go to patent to another has no claim either to title or to be reimbursed for his improvements.—*Helstrom v. Rodes*, 30 Utah 122, 83 P. 730; *Le Fevre v. Amonson*, 11 Ida. 45, 81 P. 71, 42 L. D. 113.

The rights of the first occupant must give way to the rights of the one who later enters in pursuance of some one of the systems under which the government parts with its title. But the squatter, as against a placer claimant, has the right to prove that the land was non-mineral or to attack the proposed location of it in any other respect.—*Zeiger v. Dowdy*, 13 Ariz. 331, 114 P. 565.

INTERFERENCE OF CLAIMS.

Veins Uniting on Strike or Dip.

R. S. Sec. 2336.—Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. —*Sec. 14, May 10, 1872.*

Mining Acts Based on Erroneous Presumption As to Facts—Irregularity of Veins.

The cause of the principal question under this heading is the fact that the U. S. Mining Acts concerning lode claims are based on the supposition or theory that a lode is a straight vein

whose course can be readily ascertained and indicated by a straight line or a series of straight lines; and that occasionally such a vein is crossed by another in a similar straight line, merely requiring the right of way to give each claim its proper lode. But in fact a lode is rarely a straight line; it is seldom to be traced without confusion for more than a few hundred feet; and in its course other veins are absorbed into it; and offshoots (not only spurs, but perhaps better developed veins than itself) run from it; and in its extension downward, it invariably dips laterally; and often shows a fork of which both parts approach the surface; and it will divide, and may or may not unite at another point; and it will abut suddenly upon country rock and so be thrown far to one side; and instead of showing distinct lines, mineral veins are as irregular, as disproportioned in length and width, as much intermingled, though on a larger scale, as are the veins in a block of marble.

The theory that each survey covers a distinct vein, or that a survey covers any vein at all, or that its center line follows the apex of the vein, or that its discovery shaft is sunk on a vein, is all bare assumption—these points depend upon developments, and not on diagrams or surface surveys.

Presumption That Survey Covers the Vein.

But upon proof of discovery and location it is inferred that the survey lines include the apex of the vein, and this presumption throws the burden of proof on the party alleging a departure.—*Armstrong v. Lower,* 6 Colo. 581, 585, 15 M. R. 458; *Wakeman v. Norton,* 24 Colo. 192, 18 M. R. 698, 49 P. 283.

The interference of veins by uniting on the strike, or, more commonly, the interference of claims by the holder of one part of a blind lode developing into another part of the same lode located by another as a separate lode—was of vital importance before the Act of 1872, because surface lines were not marked and each claimant was supposed to follow his vein wherever it ran. But under present law the surface lines and the apex

within them in general define the rights of all parties, with the obvious exception of:

First—Cross lodes.

Second—Veins uniting on the dip—which points are considered in the next two chapters.

Overlapping Surveys.

The holder of the oldest patent, *i. e.*, in general the patent which has the senior entry, holds all veins which apex within the area of conflict.—*Montana Co. v. Boston Co.*, 20 Mont. 336, 19 M. R. 186, 51 P. 159. The same rule applies in favor of the older title where both are possessory. Where one is patented and the other is possessory the patented claim holds because (1) it may always have been the earlier title, and (2) if not, it has become so by the failure of the overlapper to adverse.—*Empire Co. v. Bunker Hill Co.*, 114 F. 420, 52 C. C. A. 222, 22 M. R. 132.

Where there are overlapping surveys, the side lines of the senior claim do not become the end lines of the junior claim when the location extends beyond the intersecting claims.—*Cheesman v. Hart*, 42 F. 98, 16 M. R. 263. Lines may be lawfully extended over, and stakes set upon, prior locations so as to secure parallel end lines or for any other legitimate purpose.—*Del Monte v. Last Chance Co.*, 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895, 19 M. R. 370; *McElligott v. Krogh*, 151 Cal. 126, 90 P. 823.

A subsequent location is entitled to the overlap on any part of a prior location which is not legally held by such prior location.—*McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428.

CROSS LODES.

Priority of Title Controls.

R. S. Sec. 2336.—Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. * * * —Sec. 14, A. C. May 10, 1872.

The above section, being a single section of an entire Act, must, if ambiguous, be compared with all other sections of the same Act which have any bearing on the subject matter. The only other pertinent portion of the Act is that part of section 2322 which says:

The locators of all mining locations * * * where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically. * * *

In the case of lodes located under or before the Act of 1866, a right of way is clearly granted under the two sections above quoted. Those old claims held but a single vein, and the owners of any other vein had a right to work up to the very wall of the crossed vein. Such being the case, the Act of May 10, 1872, merely added the easement of the right to work through the crossed vein; but as to lodes located under the Act of May 10, 1872, the matter is complicated by the fact that all claims under that Act have a width ranging from 50 to 600 feet, and that all veins within such distance have been granted to the owner of the claim as fully as the vein upon which his discovery is sunk.

Title to the Space of Intersection.

The question has been often stated in this form: "Does the *space of intersection*, mentioned in section 2336, mean the space of the actual crossing of the veins—or the space through

which the cross lode runs from side line to side line?" But this question does not reach the merits and is based upon a misunderstanding or a want of due attention to the words of the Act.

If the cross lode have the right of crossing at the point of actual *vein crossing* only, how is it to be worked across the ground between the side line and the space of actual vein intersection? Of what avail would such a right of crossing be to those owning no easement or estate in such intervening ground? It is clear then that to make the Act have a just and sensible meaning the "space of intersection" refers to the whole distance from side line to side line, and this being conceded, the real question remains: "To whom does the cross vein *belong*, throughout the space of intersection from side line to side line?"

Sec. 2322 had already granted it to the prior owner of the crossed lode. It was within the power of Congress, by a subsequent clause, to have made the crossing lode an exception carved out of the general grant of the words of the previous section; but has it attempted so to do? The only grant of section 2336 is, the *right of way*, which of itself implies that it was *not* a grant of the vein, but of an *easement* to which the estate of the prior location is made servient.

To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it under the Act of Congress would require in the wording of the Act expressions as strong as are required to create an exception in a deed. An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator; but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant, of reaching the other end of his claim by passage through the senior location.

It seems to the authors, from the above reasoning, that a cross lode takes no estate in the claim it crosses and has no rights as against the crossed claim except the mere right to drift through, leaving all ore as the property of the crossed claim.

Decisions As to Rights of Cross Lodes.

All recent cases are in agreement with these views.—*Pardee v. Murray,* 4 Mont. 234, 15 M. R. 515, 2 P. 16; *Watervale Co. v. Leach,* 4 Ariz. 34, 33 P. 418, 17 M. R. 568; *Wilhelm v. Sylvester,* 101 Cal. 358, 35 P. 997; *Calhoun Co. v. Ajax Co.,* 27 Colo. 1, 83 Am. St. Rep. 17, 50 L. R. A. 209, 20 M. R. 192, 59 P. 607; the latter overrules the case of *Branagan v. Dulaney,* 8 Colo. 408, 8 P. 669, which had been so often cited against the above construction. The *Ajax case* was affirmed in 182 U. S. 499, 45 L. Ed. 1200, 21 Sup. Ct. Rep. 885, 21 M. R. 381.

Cross Surveys—Veins Merging.

The fact that the surveys cross does not necessarily raise the question of cross lodes. There must be an actual crossing of the veins, and if one vein unite with the other on the strike the vein beyond the point of union belongs to the holder of the older patent.—*Lee v. Stahl,* 13 Colo. 174, 16 M. R. 153, 22 P. 436; *Book v. Justice Co.,* 58 F. 106, 17 M. R. 617.

There must be two separate mineral veins to make a crossing within the law.—*Morgenson v. Middlesex Co.,* 11 Colo. 176, 17 P. 513; *Omar v. Soper,* 11 Colo. 380, 389, 7 Am. St. Rep. 246, 15 M. R. 496, 18 P. 443.

The Burden of Proof Is on the Party Alleging a Crossing.

—*Lee v. Stahl, supra.* The evidence may be sufficient to prove that veins unite without being sufficient to prove that they cross.—*Clark Montana Co. v. Butte Co.,* 233 F. 548.

No Right to Enter to Prove Crossing.

The actual crossing of lodes is more often a matter of conjecture than proof, and upon the conjecture of a crossing a

party has no right to enter upon the crossed claim to prospect for his lode or prove the crossing. The latter clause of section 2322 contains a proviso against the use of the surface in any such case. The right of crossing can be exercised only by following the vein from some point outside of the crossed claim to a point where it enters the crossed claim, and thence by drift along the same.—*Atkins v. Hendree,* 1 Ida. 95, 107, 2 M. R. 328.

Settlements Between Cross Lode Owners Will Be Upheld,

although they were at the time ignorant of their strict legal rights.—*Coffee v. Emigh,* 15 Colo. 184, 10 L. R. A. 125, 25 P. 83.

As Between Grantor and Grantee the Grantor Can Not

claim any implied right to cross the granted ground on pretense of following a cross vein. He has conveyed all veins apexing within the granted area.—*Stinchfield v. Gillis,* 107 Cal. 84, 18 M. R. 195, 40 P. 98.

VEINS UNITING ON THE DIP.

Prior Location Takes Title.

R. S. Sec. 2336.— * * * Where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.—*Sec. 14, May 10, 1872.*

The above paragraph follows that part of section 2336 which says that "priority of title shall govern" in case of interference of veins on their strike.

It often happens that on developing two veins by shafts from surface they are found to unite as they go down. A vertical section of the two lodes in such case gives the form of the letter "Y." Where both claims are possessory, the older

title, *i. e.*, the older discovery properly followed by location and record, takes the vein below the point of union. If both are patented, or if only one is patented, the obvious question is: Does the first patent hold on account of failure of the first discovery to adverse, or does the first discovery hold?

In the case of the *Champion Co. v. Cons. Wyoming Co.*, 75 Cal. 78, 16 M. R. 145, 16 P. 513, the two lodes in controversy so came together at about 500 feet in depth. The Wyoming lode was patented in 1874. The Phillip lode claimed to be a location prior in date to the Wyoming, but was not able to prove such allegation, and therefore had no state of facts upon which the Court could properly decide this point and interpret the statute. Still, they intimated that the older possessory title would hold without regard to patent. In the case of *Lee v. Stahl,* 13 Colo. 174, 16 M. R. 153, 22 P. 436, which involved the rights of cross lodes only, the Court in argument leaned to the same construction.

But the point has been since expressly decided and always to the same result, to-wit: in favor of the older location.—*Little Josephine Co. v. Fullerton,* 58 F. 521, 7 C. C. A. 340, 17 M. R. 664; *Cons. Wyoming Co. v. Champion Co.,* 63 F. 540, 18 M. R. 113. See also *Esselstyn v. U. S. Corp.,* 59 Colo. 294, 149 P. 93.

Where the apex is covered by two surveys the senior location owns the vein below the line of union. The junior location can claim no apex rights to the vein below such line. It may claim apex rights to part of the vein beyond the point where it has been covered by the senior location. Any part of the vein not within the protracted end lines fixing the apex planes belongs to the owner of the claim whose vertical lines embrace it under the claimant's common law right.—*Anaconda Co. v. Pilot Butte Co.* (Mont.), 156 P. 409. The ruling cites and disapproves the prior case of *Roxanna Co. v. Cone,* 100 F. 168, 20 M. R. 323, although the facts in the two cases when closely analyzed are not very similar.

Relation—Presumption.

Even if suspected, such union would rarely be provable in time to support an adverse claim, and even if known an adverse claim could not be brought because an adverse is allowed only where there is a surface conflict.—6 L. D. 320. The doctrine of relation back to discovery, therefore, applies, but the date of discovery and of the respective acts of location are open to parol proof. If the union becomes known or comes in contest, as it generally does after both lodes are patented, there exists a presumption in favor of each that it had a valid discovery and location at the date of entry, but there is no conclusive presumption that the date of discovery or of location claimed by the recorded location certificate upon which the patent issued is the true date.—*St. Louis Co. v. Kemp*, 104 U. S. 636, 11 M. R. 673, 26 L. Ed. 875, 2 Lind. secs. 730, 783; *Last Chance Co. v. Tyler Co.*, 61 F. 557, 9 C. C. A. 613. Conclusive presumptions binding on all parties are fixed only where the party to be bound has had opportunity to have his day in court.—*Uinta Co. v. Creede Co.*, 119 F. 164, 22 M. R. 445.

SIDE VEINS WITHIN LOCATION LINES BEFORE MAY 10, 1872.

Congressional Bounty or Confirmation.

R. S. Sec. 2328.—Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.—*Sec. 9, May 10, 1872.*

Limited to Single Vein.

Under the original Congressional Act of 1866, no vein except the first claimed was covered by the location or conveyed by the patent.

A lode claim, therefore, located before May 10, 1872, originally covered but one vein, and a patent issued before that date covered but one vein.—*Blake v. Butte Co.*, 2 Utah 54, 9 M. R. 503; *Eclipse Co. v. Spring*, 59 Cal. 304.

Side Veins Donated to Old Claims Since 1872.

By the A. C. of 1872, which gave to all new locations and future patents the benefit of everything between their side lines, it was added that all old locations and all patents under the old Act should have the same benefit, always saving any rights which had intervened before the passage of the Act of 1872.—R. S. Sec. 2328.

The result of this Act is that a location properly made before May 10, 1872, or a patent issued before that date, covers all side and other interfering veins practically to the same extent, and as fully as locations and patents under the present law; always saving the exception in the section last above cited.—*Pardee v. Murray*, 4 Mont. 234, 15 M. R. 515, 2 P. 16; *Walrath v. Champion Co.*, 63 F. 552.

SIDE VEINS WITHIN LOCATION LINES SINCE MAY 10, 1872.

All Veins Apexing Within the Lines.

R. S. Sec. 2322.—The locators of all mining locations heretofore made or which shall hereafter be made, * * * where no adverse claim exists * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, * * * —*Sec. 3, May 10, 1872.*

Surface Lines and Apex Define the Claim.

Under the law, as it has existed since May 10, 1872, it is clear that all veins whose tops or apices are within the lines of the claim go with the lode which gives the name to the claim; and the surface lines, rather than identity of the veins, are made to control the extent of the claim, and to fix the boundaries between adverse parties.—*Book v. Justice Co.*, 58 F. 106, 109, 17 M. R. 617; *Doe v. Waterloo Co.*, 54 F. 935.

The possible exceptions to this general assertion are:

1. In regard to what are commonly called cross lodes; p. 185.

2. Where the outcrops of two apparent veins appear on two separate lines at the surface, but in their downward course such veins dip into each other, unite and form a single vein; p. 188.

3. Instances where a location on the dip may have cut off the right of a later appropriator on the apex to follow beyond his side lines extended vertically downward; p. 211.

4. Locations and patents before May 10, 1872, where adverse rights had intervened so as to prevent them from taking the benefit of the grant of side veins under the Act of that date; p. 190.

One Set of End Lines for Side Veins.

See p. 215.

DEPARTURE OF LODE FROM SIDE LINES.

Statement of the Point.

That the vein, and not the surface, is the material grant of a patent to a mining claim has never been disputed; nor can it be denied that it is the intention both of the purchaser in buying, and the government in selling, to deal with the mineral deposit, the surface being, usually, comparatively worth-

less to either. And if the case lay between the government and the purchaser alone, this manifest intention might prevent any attempt to confine the party to an erroneous survey, giving him only valueless surface, notwithstanding the material fact that it is the patentee, and not the United States, who has chosen the lines which produce the mischief.—*Patterson v. Hitchcock,* 3 Colo. 533, 5 M. R. 542.

But it is the rights of innocent third parties, holding claims beyond the located or patented side lines, which has rendered this question so important, and which must result in maintaining the consistent construction already given to the Act of Congress, confining every claim to its own lines; though even if it were a matter of indifference, this holding requires no forced construction of the Acts under ordinary rules of interpretation, and had been the constant ruling of the Appellate and Circuit Courts before its confirmation by the Federal Supreme Court.

Uniformity of Rulings on the Point.

This question, with singular unanimity, has been set at rest by the decisions of many courts. It is now beyond controversy that the moment the apex of a vein leaves either side line of its survey the locator has no further claim thereto, on the strike, beyond such point of departure.—*Wolfley v. Lebanon Co.,* 4 Colo. 112, 13 M. R. 282; *Johnson v. Buell,* 4 Colo. 557, 9 M. R. 502; *The Flagstaff case,* 98 U. S. 463, 25 L. Ed. 253, 9 M. R. 607; *The Golden Fleece case,* 12 Nev. 312, 1 M. R. 120.

These decisions apply equally to patented and unpatented claims, and have been universally acceded to as the only construction which would give to a mining claim the same certainty of title which belongs to other classes of real estate which are free from the complications of dips and departures.

Facts of the Golden Fleece Case.

The case from Nevada is singularly illustrative of the injustice which would result from a contrary holding.

The Golden Fleece lode was surveyed and staked in 1874, upon a vein supposed to run northwest and southeast. The location claiming 1,500 feet ran due northwest and southeast, with 600 feet width. Afterwards developments by its workings and on the Leonard lode, whose discovery was about 800 feet to the southwest, showed that the vein really ran at right angles to its originally supposed course. The Leonard lode having applied for patent, the Golden Fleece made a second survey at right angles to the first which, of course, embraced all the workings and croppings on the Leonard; and then filed its adverse claim, based on such relocation. But it was held that the Golden Fleece must be confined to its original location and to that part of the vein within the lines of such original location.

Same Holding on Old 50-Foot Patents.

The patent in the *Wolfley case* was issued under the Act of 1866, so that the decision necessarily applies to all patents; because the argument in favor of following the vein, under the Act of 1866, was much stronger than in the case of patents under the later Act.—*Larned v. Jenkins,* 113 F. 634, 51 C. C. A. 344, 22 M. R. 94.

Not Color of Title.

In a later suit, upon the same patent construed in the *Wolfley case,* it was held that where the patent owner had followed his vein outside and had held it adversely for five years, that he had not even such "color of title" as would operate to allow him the benefit of the statute of limitations.—*Lebanon Co. v. Rogers,* 8 Colo. 34, 5 P. 661.

Surface Location Beyond Point of Vein Departure.

If the location fail to cover the vein, not only is the vein lost after it leaves the side lines, but that portion of the location which extends beyond the point where it loses the vein has been decided to be defeasible, if not void, having no dis

covery vein upon which to base any further claim to either surface or other veins which may lie within its lines.—*Patterson v. Hitchcock,* 3 Colo. 533, 5 M. R. 542. See Plat, p. 20.

The reason of this decision is the wording of the Act of Congress (Sec. 2320) restricting a lode claim to a certain number of feet on "each side of the middle of the vein"—so that if the vein is no longer found within the lines of the claim the locator has no basis upon which to hold any number of feet, beyond the point of departure. Discarding this language of the statute, the case of *Watervale Co. v. Leach,* 4 Ariz. 34, 33 P. 418, 17 M. R. 568, holds that a lode location need pay no attention to the strike and the only consequence of failure to plant it on the strike is to lose the right to follow on the dip.

The decisions on this point do not apply to patented claims; *Argonaut Co. v. Turner,* 23 Colo. 400, 58 Am. St. Rep. 245, 48 P. 685, 18 M. R. 556, and there is an initial presumption or *prima facies* that the survey covers the vein until the contrary is affirmatively proved.—*Armstrong v. Lower,* 6 Colo. 393, 15 M. R. 631.

The reason that a patented claim is valid to its full extent for what it does cover is that the patent is of a "piece of land," with all the surface its lines include; the patent is supposed to have been based on a location made on a vein, with only the statutory width on either side, and if in fact it was otherwise, or if the vein departed before it reached the end line, it is too late after patent for any adverse claimant to set up any such variations to defeat the operation of its grant to the entire surface and to such part of the vein as it does cover.—*Gleeson v. Martin White Co.,* 13 Nev. 442, 9 M. R. 429.

VEIN WIDER THAN PATENT.

In an early case between the Colorado Central and the Equator lode in the U. S. Court at Denver, each claimed under a 50-foot patent, the vein being admittedly 100 feet wide. The Court held that the older patent, the Equator,

could hold only to its side line and could not claim extralateral rights on its dip underneath the Colorado Central patent. In *Bullion Co. v. Eureka Co.*, 5 Utah 3, 11 P. 515, the majority of the Court took the opposite view.

In *Empire Co. v. Bunker Hill Co.*, 114 F. 417, 52 C. C. A. 219, 22 M. R. 104, the Court held that where there were two patents, one covering the hanging and the other the foot wall, the prior location had extralateral rights and took the whole vein except, of course, the segment within the vertical lines of the later location. The case of *St. Louis Co. v. Montana Co.*, 104 F. 664, 56 L. R. A. 725, 44 C. C. A. 120, 21 M. R. 57, which it cites, is to the same effect. These precedents are followed in an able opinion by VAN DEVANTER, C. J., of the Eighth Circuit. *U. S. M. Co. v. Lawson*, 134 F. 769, 67 C. C. A. 587; affirmed, *L. v. U. S. M. Co.*, 207 U. S. 1, 52 L. Ed. 65, 28 Sup. Ct. Rep. 15.

A discovery shaft may be the valid basis of a location although it fails, being up to the edge of appropriated ground, to cover the whole width of the lode.—*Larkin v. Upton*, 144 U. S. 19, 36 L. Ed. 330, 12 Sup. Ct. Rep. 614, 17 M. R. 465; *Upton v. Larkin*, 7 Mont. 449, 15 M. R. 404, 17 P. 728, 732.

LODES, VEINS AND LEDGES.

Definition of the Terms.

The word "lode" and the word "vein" are used indiscriminately in the Acts of Congress* as well as in the popular language, to signify the same thing. In Bainbridge on Mines, the text, page 2, defines them in the same sentence: "A mineral lode or vein is a flattened mass of metallic or earthy matter, differing materially from the rocks or strata in which it occurs." A note to the same suggests the use of the word "vein" as incorrect, when applied to such deposits as those of

*See the text of Sec. 2320, p. 641; Sec. 2322, p. 642.

anthracite coal. But the note is not justified, for the word "vein" is universally used to include coal and other flat, non-metallic deposits, while the word "lode" is not so used. This is the principal distinction in the use of the words. The word "lode" is of Cornish origin (*Bullion Co. v. Croesus Co.*, 2 Nev. 168, 176, 90 Am. Dec. 526, 5 M. R. 254); "vein" is Latin. In *Eureka Co. v. Richmond Co.*, Fed. Cas. No. 4548, 9 M. R. 578, 4 Sawy. 302, where, it is said, every known definition was presented to the Court, the opinion does not intimate any difference in their meaning, but says: "Those acts give no definition of the term 'lode.' They use it always in connection with the term 'vein.'"

The word "ledge" came into use in California after the discovery of the quartz mines, because they were generally found in the hills above the gulches, and were often identified with protruding outcrop. The word "reef," not used in the acts, is the popular equivalent for lode or ledge in Australia and South Africa. The word "range" is much used in the lead districts of the Mississippi valley.—*Raisbeck v. Anthony*, 73 Wis. 572, 17 M. R. 148, 41 N. W. 72; *St. Anthony Co. v. Shaffra*, 138 Wis. 507, 120 N. W. 238.

Connection With Context of the Statute.

The only limitation or qualification in the United States Mining Statutes in connection with the words "veins or lodes" or "veins, lodes and ledges," is the expression "of quartz or other rock in place."

"In Place."

These words have been construed material in cases where the vein has been found eroded or broken up. In *Stevens v. Williams*, Fed. Cas. No. 13,414, 1 M. R. 557, where both the overlying and underlying bodies were solid, the deposit was held to be a lode "in place."

In *Tabor v. Dexter*, Fed. Cas. No. 13,723, 9 M. R. 614, where the location was on ore where the overlying rock had

been eroded, the ore body remaining covered only with wash or gravel, it was held that the lode was not in place. A like ruling was made in *Leadville Co. v. Fitzgerald,* Fed. Cas. No. 8158, 4 M. R. 380. The practical point in these decisions is that where a location is claimed to be upon the apex of a lode, it must be upon such apex at a point where it is in place between the original enclosing rocks to be valid.

Rock in place is contradistinguished from the soil or *debris.* But the lode is in place, though loose, broken or disintegrated.—*Jones v. Prospect Co.,* 21 Nev. 339, 17 M. R. 530, 31 P. 642.

Size and Richness of Deposit Not Material.

In *North Noonday Co. v. Orient Co.,* 1 F. 522, 6 Sawy. 299, 9 M. R. 529, 537, SAWYER, J., says: "A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statute. It may be very thin and it may be many feet thick, or thin in places—almost, or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite, or nearly, barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode." Its validity as a thing that may be located does not depend on what it runs.—*Shreve v. Copper Bell Co.,* 11 Mont. 309, 28 P. 315; *Stinchfield v. Gillis,* 96 Cal. 33, 17 M. R. 497, 30 P. 839. Neither walls nor pay ore is essential, but it must show rock distinguishable from the country.—*Burke v. McDonald,* 2 Ida. 646, 679, 17 M. R. 325, 33 P. 49. The fissure must be defined.—*Cons. Wyoming Co. v. Champion Co.,* 63 F. 540, 18 M. R. 113. On the facts in this case it is too late to call one vein a spur and the other a main vein.—*Carson City Co. v. North Star Co.,* 73 F. 597, 601.

There Must Be More Than a Trace of Mineral.

—*U. S. v. Rossi,* 133 F. 380, 66 C. C. A. 442; but an assay of one or more ounces (of silver) will suffice.—*Stevens v. Gill,* Fed. Cas. No. 13,398, 1 M. R. 579.

Whatever a Miner Would Follow With the Expectation of finding ore, or similar phrases, have been adopted as the practical test of what is to be considered a lode under the Act of Congress.—*Eureka Co. v. Richmond Co.,* Fed. Cas. No. 4548, 9 M. R. 578, 4 Sawy. 302; *Harrington v. Chambers,* 3 Utah 94, 1 P. 362. Any body or belt of mineralized rock is a lode.—*Book v. Justice Co.,* 58 F. 106, 17 M. R. 617; *Shoshone Co. v. Rutter,* 87 F. 801, 31 C. C. A. 223, 19 M. R. 356.

Different Degrees of Proof.

In *Fitzgerald v. Clark,* 17 Mont. 100, 52 Am. St. Rep. 665, 30 L. R. A. 803, 42 P. 273, 283, the distinction is made between the proof sufficient upon which to base a location and the proof required where the continuity of the vein is in question, holding to greater strictness in the latter case. The degree of proof required, and the use of the words "considerable distance" or "considerable interval" in the continuity, in the instructions, is discussed in *Butte Co. v. Societe,* 23 Mont. 177, 75 Am. St. Rep. 505, 58 P. 111.

What might be sufficient proof on which to maintain a mining location may not be sufficient to maintain an assertion of extralateral rights.—*Gr. Cen. Co. v. Mammoth Co.,* 29 Utah 490, 83 P. 648; *Mammoth Co. v. G. C. Co.,* 213 U. S. 72, 53 L. Ed. 702, 29 Sup. Ct. Rep. 413.

Whether a crevice is of such value as to justify a prudent miner to follow is a proper subject for expert testimony.—*Wilson v. Harnette,* 32 Colo. 172, 75 P. 395.

In Land Office Controversies the Value of the Mineral deposit is a matter immaterial to the government save in contests between mineral and non-mineral claimants.—21 L. D. 440.

In the *Rough Rider case* the department held that the recognized custom of the district in treating a certain formation as a lode should be recognized on the question of what is valid discovery.—42 L. D. 584.

Faults and Pinches Do Not Affect the Legal Continuity of the vein.—*Cheesman v. Shreeve,* 40 F. 793, 17 M. R. 260. The mineral beyond the fault is a part of the same lode or range.—*Raisbeck v. Anthony,* 73 Wis. 572, 41 N. W. 72, 17 M. R. 148.

But when a fault is so great that the lines of the claim do not catch it beyond the break it ends the rights of the patentee to the vein.—*Stewart Co. v. Ontario Co.,* 23 Ida. 724, 132 P. 787. In *Wall v. U. S. M. Co.,* 232 F. 613, the effect of a faulting fissure is considered.

Show of Mineral by Seepage.

While the richness or poverty of the vein or of the seam or stratum of rock followed as a vein, in determining the question of such rock being vein matter, is not of controlling importance, yet, on practical acquaintance with the subject, it will be seen that such point of relative value can not be wholly ignored.

Where the opinions say that it may be rich or poor, they refer to the well-known fact that true veins, for long distances, are often quite barren. But it does not follow that every seam of rock which will assay is necessarily any vein at all. For there do exist seams which carry a little mineral and yet are not veins within the geological or legal definition. The mineralization in such cases, in some of them at least, is caused by infiltration of ore from a true vein or deposit along some plane of cleavage or along the plane between two formations, or through mere mechanical cracks in the rock, and all their mineral is only precipitated or crystallized seepage from the lode or deposit above. Such bastard veins have just enough resemblance to true veins to be used as a pretext of title

against neighboring locations on the legitimate vein. They are generally lacking in walls, continuity and in the normal uniformity of a true vein, and yet may have slips which are practically indistinguishable from walls, and have some discolored matter and particles of ore, just enough to be dangerously similar to what is of value only as it is unlike such things.—*Golden v. Murphy,* 27 Nev. 379, 75 P. 625, 76 P. 29.

The question of vein or no vein in law, is, in such cases, a fact to be determined by the jury under the instructions of the Court.—*Iron-Silver Co. v. Mike & Starr Co.,* 143 U. S. 394, 36 L. Ed. 201, 12 Sup. Ct. Rep. 543, 17 M. R. 436; *Blue Bird Co. v. Largey,* 49 F. 289.

Mineral Bearing Zone.

A broad formation impregnated everywhere with mineral, but traversed by true fissures within itself, can not be considered as the lode; the fissures within such zone are the lodes and the zone is the country.—*Mt. Diablo Co. v. Callison,* 5 Sawy. 439, 9 M. R. 616, Fed. Cas. No. 9886. Ore distributed generally, though unequally, throughout the entire mass of limestone of the mountain does not constitute a continuous lode such as may be followed beyond the lines of its location.—*Hyman v. Wheeler,* 29 F. 347, 15 M. R. 519. A belt of porphyry containing mineralized seams is a lode.—*Book v. Justice Co.,* 58 F. 106, 17 M. R. 617; *Shoshone Co. v. Rutter,* 87 F. 801, 31 C. C. A. 223, 19 M. R. 356. When a larger deposit is separated into two distinct seams with separate walls, each seam is a separate lode.—*Doe v. Waterloo Co.,* 54 F. 935; *Hayes v. Lavagnino,* 17 Utah 185, 53 P. 1029, 19 M. R. 485.

Where the mineralization of the alleged lode is not appreciably greater than the surrounding rock it does not constitute a vein. The absence of walls and want of continuity commented on.—*Grand Central M. Co. v. Mammoth M. Co.,* 29 Utah 490, 83 P. 648.

In determining what is such a lode as has extralateral rights the geological conditions of the district are to be considered.—*Golden v. Murphy,* 31 Nev. 395, 103 P. 394, 105 P. 99.

A broad zone of mineral bearing rock with streaks of mineral and barren spaces was held to be a lode.—*United States M. Co. v. Lawson,* 134 F. 769, 67 C. C. A. 587. That is to say, the broad zone and not the mineral streaks was the vein. In a later controversy on the same formation the like ruling was made.—*Wall v. U. S. M. Co.,* 232 F. 614.

Ore in Pockets, Vugs or Other Irregular and Disconnected occurrences without vein matter between does not make a lode. —*Cheesman v. Shreeve,* 40 F. 787, 17 M. R. 260. Nor ore bodies formed outside the fissure.—*Tombstone Co. v. Way Up Co.,* 1 Ariz. 426.

Where the Continuity of the Ore Body Is Broken by the contact becoming barren for a considerable distance, the legal extent of the vein ceases.—*Stevens v. Williams,* 1 M. R. 557, Fed. Cas. No. 13,414; *Leadville Co. v. Fitzgerald,* 4 M. R. 380, Fed. Cas. No. 8158. A vein need not be a straight line nor uniform in dip, thickness or richness of ore. The enclosing cleft or fissure may narrow or even close for a few feet and be found further on. Its continuity may be proved by following either the ore or the rock which carries the ore. Slight proof of ore is sufficient where the enclosing boundaries are distinct; there need be no proof of such boundaries if the ore itself can be followed. But if the vein disappear so far or so completely that it can not be recognized when it is again found or alleged to be found, there is no sufficient proof of continuity. —*Iron-Silver M. Co. v. Cheesman,* 116 U. S. 530, 29 L. Ed. 712, 6 Sup. Ct. Rep. 481; followed substantially in *Hyman v. Wheeler, supra,* and in the *Cheesman case,* 40 F. 787, 17 M. R. 260. Where the lode has no definite walls the ore bodies are the guides to follow.—*Bunker Hill Co. v. Empire Co.,* 134 F. 268.

All Deposits "in Place" Are Lodes.

The uniform ruling has been that all forms of metallic mineral or mineral gangue in place, whether fissure or contact veins, or impregnations, or other irregular deposits, should be

construed to come within the expression "veins or lodes" used in the Act of Congress, and as such to be subject to location and patent under the Act.—*Hayes v. Lavagnino,* 17 Utah 185, 53 P. 1029, 19 M. R. 485. There has been in fact a concession that such should be the holding rather than a contention to the contrary. The substantial and contested point has been whether a location or patent on certain forms of deposit was entitled by virtue of including the apex or so-called apex of the vein or deposit, to follow the vein or deposit beyond the side lines underneath the adjoining ground or claims of other parties. This point will be considered under the next heading, APEX.

Evidence of what has been followed up and located on in the same mining locality is admissible as to what is sufficient lode discovery.—*Ambergris M. Co. v. Day,* 12 Ida. 108, 85 P. 109.

Lode Located as Placer.

A bed of rock phosphate in place is a lode; the location of the same as a placer is void and upon adverse by the lode against the placer the lode claimant recovered judgment.—*San Francisco Co. v. Duffield,* 201 F. 830, 120 C. C. A. 160. The case discusses the distinctions between lodes and placers.

APEX.

The Grant of the Apex Right.

R. S. Sec. 2322.—The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations.

Limitation to Planes of Projected End Lines.

But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.—*Sec. 3, May 10, 1872.*

Apex rights are conveyed by patent as of the date of discovery so far as third parties are concerned, although the original possessory claim thereto was defective.—*Clark Montana Co. v. Butte Co.,* 233 F. 548.

The Mining Act of 1866 which was the first provision for advancing possessory claims to patent provided that the applicant should be granted

such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

The Act of 1872 made a material change by providing that the end lines of every lode claim shall be parallel and that these end lines protracted should become bounding planes between which the proprietor of the apex should have the right to follow his vein.

The theory of the Act was that a survey would enclose a vein along its center line from end to end and that the end lines would be at right angles to the strike of the vein. But there are many locations where the miner is not so fortunate as to place his stakes so as to comply with such theory. The course of the lode when located or when surveyed for patent is generally a matter more or less of conjecture and even if known, the vicinity of prior claims may interfere with the survey desired; and, there being no requirement that the side and end lines must be at right angles, it is found in practice that many difficult points arise upon most of which by this time there is a satisfactory judicial conclusion.

The common law grant of lands conveys the surface and whatever minerals underlie the surface within lines drawn perpendicularly downward toward the center of the earth.

The apex clause in the Act modifies the common law by enlargement to the extent that the claimant owns and may follow any lode whose apex he covers, beyond his side lines under land adjoining. On the other hand, he is not the owner of lodes found within his lines extended downward vertically where such lodes have their apices outside of his surveyed lines.—*Roxanna Co. v. Cone,* 100 F. 168, 20 M. R. 323.

Besides the right to follow his own vein on the dip, he is, under the common law grant of the patent, owner of the soil and rock within his lines carried vertically downward.

This common law grant gives him the ownership of any deposit of mineral belonging to a class which has no apex and also of any lode which, though it have an apex, such apex is not located upon or is surveyed in such form as to give no extralateral rights to the proprietor of such exterior location.

The above general proposition must be understood with reference to certain limitations and conditions as follows:

The Lode Must Have an Apex.

The outcrop or edge of a vein or deposit is not necessarily its apex. The typical or true fissure vein is a narrow zone of ore-bearing rock descending indefinitely in depth. It is essentially a perpendicular formation, though always, or nearly always, inclining some degrees from true; this inclination is called its dip. The bounding planes of such vein are called its walls. The outcrop or nearest approach of such a vein to the surface is, and always has been, properly styled its apex. Such were the veins generally known and worked on the Pacific Slope at the time of the passage of the Mining Acts.

To give such veins the right to their dip was essential to their full use and enjoyment.

Other classes of veins are essentially horizontal in their formation. If found to approach the perpendicular such fact is accidental, not incidental—occasional and rare, not usual or normal. They may be, like coal, a layer of rock itself constituting a separate geological stratum; or they may be a fill-

ing between the planes of contact of two dissimilar formations; or they may be impregnations diffused irregularly through a broad zone. Such deposits are called beds or even fields, terms obviously inapplicable to perpendicular deposits. Their upper boundary rock is commonly and properly called the roof—rarely the wall—and while they may have an outcrop, such outcrop was never known among miners as an "apex" until the use of such term in the Mining Acts induced the attempt to abuse the term by imposing it upon the outcrop of horizontal formations.

The term itself means the top or highest point, and has no significance when applied to horizontal deposits.

A location on the top of an anticlinal fold was allowed dip rights through both side lines in *Jim Butler Co. v. West End Co.*, (Nev.) 158 P. 876.

Blanket Veins.

In the case of *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 901, 17 M. R. 59, the top of the lode was exposed by erosion and the erosion extended downward where the side or edge of the vein was exposed as it extended into the earth on its dip of about 8 degrees. The Sitting Bull Survey was laid upon this lateral outcrop and sought to enjoin the claim below it. The Court found as a matter of fact that the outcrop of the vein on which the Sitting Bull was patented was the exposure of its lateral edge and not of its top or true apex and that it was therefore not entitled to extralateral rights.

Stewart Co. v. Ontario Co., 23 Ida. 724, 132 P. 787, is a very similar case. It also decides in terms the point stated in the next paragraph—that a blanket vein has no extralateral rights.

The case of *Gilpin v. Sierra Nevada Co.*, 2 Ida. 696, 23 P. 547, 17 M. R. 310, intimates that blanket veins can not claim to have an apex under the Mining Acts. The inclines on the deposit in that instance as worked ran from the surface up, instead of down.

In the Leadville and Aspen cases arising upon veins of the

character last above described, in the United States Circuit Court at Denver, any such distinction as above made has not been recognized. But the strict ruling on other points, that there should have been no prior location on the dip; that the apex location must be made on a vein in place, and the necessity of having the apex parallel to the side, and not parallel to the end lines, which is a practical impossibility when the real deposit is a deeply imbedded field, bed or basin, with a more or less circular rim, have circumscribed and practically defeated most attempts to follow such veins on their dip.

The strength of our contention is increased by an attempt to apply the apex law to such deposits as the lead and zinc beds at Joplin, Missouri. There the country for miles is underlaid by a stratum carrying zinc and lead ore. The miner starts a shaft in the open prairie, without any indications whatever of mineral, and at a certain depth confidently expects to pierce this ore-bearing stratum, which is substantially a flat underlying deposit, the outcrop of which may be miles distant—if it have any outcrop at all it is only when some bluff or ravine would expose the edge of the bed at the surface. As to such deposits it is obvious that there is no such thing as locating a claim so many feet on each side of the center of the vein, for, as the Department holds: "The apex of the lode is co-extensive with the side lines."—29 L. D. 689. In *Iron S. Co. v. M. & S. Co.*, 143 U. S. 394, 36 L. Ed. 201, 12 Sup. Ct. Rep. 543, 17 M. R. 436, the opinion refers to this distinction and recognizes the validity of such blanket lode locations, treating this incident of no apex proper as an item of minor importance. Blanket veins must be located as lode claims and not as placers.—*Iron S. Co. v. Campbell*, 17 Colo. 274, 29 P. 513.

The End Lines Must Be Parallel.

When we claim the right to follow a vein on its dip as it leaves its side lines and plunges into the earth it is obvious that we are at once dealing with a third dimension rarely referred to in surface grants. It is also obvious that unless

this third dimension is guided by parallel planes the claim will, if the end lines diverge, extend indefinitely as it goes down. If they converge, it would, like a wedge, diminish to a line. The statute therefore in terms requires end lines to be parallel and that requirement has no reasonable meaning except as taken in connection with the right to follow the lode on the dip. If, therefore, the locator fail or neglect to make his end lines parallel he is in disobedience of the terms of the act, by either fault or misfortune, and has no right to this statutory donation. It was so ruled in *Montana Co. v. Clark,* 42 F. 626, 16 M. R. 80, where the claim was surveyed as a triangle which could not geometrically have two parallel lines. The same in the *Elgin case,* 15 M. R. 641, which had a survey in the shape of a horseshoe. In both these cases the reason for the parallelism of end lines is fully stated.

The *Eureka case,* 4 Sawy. 302, 9 M. R. 578, Fed. Cas. No. 4548, has been cited *(Horswell v. Ruiz,* 67 Cal. 111, 7 P. 197, 15 M. R. 489) as ruling that the requirement of end lines is directory merely and that no consequences attach to its neglect, but the further details of the opinion (on page 596) must qualify the words to that effect used on page 593. We can see no reason why a survey without parallel end lines should be void for the ground within its lines, nor can we conceive that it should be allowed extralateral rights if it do not have end lines substantially parallel. But the case of *Doe v. Sanger,* 83 Cal. 203, 23 P. 365, decides in terms that the end lines need not be parallel and that they do not affect the right to follow the lode on the dip for the weakest of all reasons in statutory construction, to-wit: because the requirement of parallelism and the grant of the dip are contained in two different sections of the Mining Act.

It is evident from the language used and the plats in *Walrath v. Champion Co.,* 171 U. S. 294, 43 L. Ed. 170, 18 Sup. Ct. Rep. 909, 19 M. R. 410, in the *Stone Lode case,* 118 U. S. 196, 30 L. Ed. 98, 6 Sup. Ct. Rep. 1177, 15 M. R. 641, and other decisions that practically a lode may be surveyed in any shape which a locator chooses to give to his lines.

That there is no requirement that every claim be substantially a parallelogram or must have two end lines and two side lines. But no such irregular survey has ever been allowed extralateral rights except in the case of *Doe v. Sanger, supra.* Such a location is good for its surface ground and for such parts of veins (not held by location on the apex outside) as may be found within its vertical planes.—*Crown Point Co. v. Buck,* 97 F. 462, 38 C. C. A. 278.

Apex rights were claimed for the clear ground in a triangle with end lines projected over older claims, but the Court did not decide it in terms because it was not certain whether such end lines were parallel.—*McElligott v. Krogh,* 151 Cal. 126, 90 P. 823.

Where on going to patent certain prior surveys cut into one end line of a claim so as to give it a zigzag shape if the several courses of such line were followed as they meandered, such exclusions are to be disregarded and the original straight end line is the true end line.—*Big Hatchet Co. v. Colvin,* 75 P. 605, 19 Colo. App. 405; *Jim Butler Co. v. West End Co.,* (Nev.) 158 P. 876.

Locations under the Act of 1872 to claim extralateral rights must have parallel end lines.—*Daggett v. Yreka M. Co.,* 149 Cal. 357, 86 P. 974. The Department has held that end lines must have substantial existence, and that two-tenths of a foot in length is not an end line within the meaning of the statute. —34 L. D. 470, 35 *Id.* 22.

End Lines Under Act of 1866.

It has been constantly held that patents perfecting locations older than the Act of May 10, 1872, may have extralateral rights without the necessity of parallel end lines, and where the end lines converge they may be protracted.—*Carson City Co. v. North Star Co.,* 73 F. 597; *Central Co. v. E. Central Co.,* 146 Cal. 147, 79 P. 834. (Affd. *E. C. Co. v. C. E. Co.,* 204 U. S. 266, 51 L. Ed. 476, 27 Sup. Ct. Rep. 258.) In *Argonaut Co. v. Kennedy Co.,* 131 Cal. 15, 82 Am. St. Rep. 317, 21 M. R. 163, 63 P. 148, where the end lines diverged the dip right was given at right angles to the strike of the

vein. If the Argonaut case is correct and if parallelism of end lines is not required, then we see no reason for drawing the distinction between end lines converging or diverging nor why the former should not enjoy equal dip rights with the latter in these old locations.

The Lode Crossing Both Side Lines.

In the case of *Flagstaff Co. v. Tarbet,* 98 U. S. 463, 9 M. R. 607, 25 L. Ed. 253, the Supreme Court of the United States at an early date held where the lode crossed from side line to side line at practically a right angle to its survey, that in such case the side lines became end lines, that is to say: They passed down through the lode vertically and cut off all extralateral rights. This decision has been uniformly followed in all cases where the lode has been found to leave its located or patented area through both side lines.—*King v. Amy-Silversmith Co.,* 152 U. S. 222, 38 L. Ed. 419, 14 Sup. Ct. Rep. 510, 18 M. R. 76; *Argentine Co. v. Terrible Co.,* 122 U. S. 478, 30 L. Ed. 1140, 7 Sup. Ct. Rep. 1356, 17 M. R. 109; *Parrot Co. v. Heinze,* 25 Mont. 139, 87 Am. St. Rep. 386, 53 L. R. A. 491, 21 M. R. 232, 64 P. 326; *S. Nev. Co. v. Holmes Co.,* 27 Nev. 107, 103 Am. St. Rep. 759, 73 P. 759.

The Lode Leaving One Side Line.

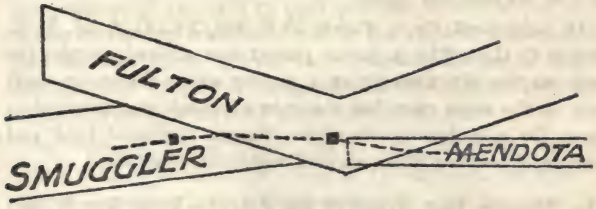
After much greater contention than in the instance of the lode crossing from side line to side line, it has now been repeatedly held that where the lode leaves the claim through one end line and one side line it preserves its extralateral rights, to-wit: the right to follow the vein on its dip from the end line to the point on the side line where it leaves the claim. Such end line is protracted vertically downward and produced on its course to form a bounding plane and the other bounding plane is found by protracting and producing another line parallel to the end line plane across the claim at the point where the vein goes out. *Last Chance-Tyler case,* 54 F. 284, 61 F. 557, 9 C. C. A. 613; *Cons. Wyoming Co. v. Champion Co.,* 63 F. 540, 18 M. R. 113; *Del Monte and Last*

Chance case, 66 F. 212, 18 M. R. 188, 171 U. S. 56, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895, 19 M. R. 370; *Clark v. Fitzgerald*, 171 U. S. 92, 43 L. Ed. 87, 18 Sup. Ct. Rep. 941; *Carson City Co. v. North Star Co.*, 73 F. 597.

The vein might leave both side lines within a few feet of either end line, in which case it might be said that the survey practically covered the apex, but we apprehend that such a location would have no more rights than if it crossed at right angles. It is the going out at the end lines that gives the extralateral right.

Divergence from Same Side Line Twice.

In *Catron v. Old*, 23 Colo. 433, 58 Am. St. Rep. 256, 48 P. 687, 18 M. R. 569, the Fulton survey had an angle in the center making it a V-shaped claim; crossing the diverging halves the lode left the location twice through the south side line, the diagram of the conflict being as follows:



The Supreme Court of Colorado held that the Fulton Lode had no right to follow the vein upon the dip into any ground beyond its side line carried down vertically, and the correctness of such ruling could not be seriously disputed under the authority of the *Amy-Silversmith case*.

Discovery on the Dip.

In *Van Zandt v. Argentine Co.*, 8 F. 725, 2 McCr. 159, 4 M. R. 441, it was held that a prior discovery on the dip would hold against a junior discovery on the apex above. It is also obvious that all tunnel discoveries must necessarily be made

on the dip and their validity has never been doubted.—*Jones v. Prospect Co.*, 21 Nev. 339, 31 P. 642, 17 M. R. 530. Where the width of the claim is sufficient to allow the apex to be within the side lines all doubt on the point ceases, but where the vein discovered on the dip apexes in foreign ground it is argued that it never becomes the property of the locator; that though he may rightfully plant his discovery shaft on the dip he must so locate as to cover the apex above the point of discovery with his survey.—Lindley on Mines, sec. 364. See 33 L. D. 142.

The case is stronger for such a discovery after patent, for there then arises a presumption that the patent was based on a valid discovery. If there be a valid discovery the patent should certainly convey the vein upon which such discovery was made; and the equity of the case in favor of such an instance, whether location or patent, is to urge strongly against such close construction as would deprive the discoverer of his asserted rights.

In *Colo. Cent. Co. v. Turck*, 50 F. 888, 2 C. C. A. 67, 54 F. 262, 4 C. C. A. 313, a junior patent was allowed to take the vein on the dip underlying a patent whose discovery shaft was on the same vein, but the vein of which was assumed to leave the side lines on its strike, though it dipped back and remained between them carried vertically downward.

The Common Law Grant of the Patent—Veins Cut Within the Lines, Apexing Outside.

The literal grant of a patent issued under the Mining Acts reads as if it conveyed all veins apexing within the lines and excluded all those whose apices were outside. And such is its clear meaning where a prior location has covered the apex of such veins found to dip underneath the patented claim. But where in sinking, veins or deposits are found which have either no apex, or an apex not located upon outside, or an apex not located upon at the date of the patent under which such veins or deposits are found, to whom do such veins or deposits belong?

The decisions have with great uniformity held that such new discoveries presumptively belong to the patentee and refuse to give a literal construction to the patent. The case is fully stated and the point ruled in *Doe v. Waterloo Co.*, 54 F. 935, following *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887, 17 M. R. 59; *Leadville Co. v. Fitzgerald*, 4 M. R. 385, Fed. Cas. No. 8158; *Mammoth M. Co. v. Gr. Cent. M. Co.*, 213 U. S. 72, 53 L. Ed. 702, 29 Sup. Ct. Rep. 413.

In *Montana Co. v. Clark* the ruling was made that such veins apexing outside, but not located outside, remained still the property of the United States.—16 M. R. 80, 42 F. 626.

This ruling is theoretically correct and such vein or part of a vein would become the estate of any locator who made a proper location upon such apex outside. But it often happens that all the surface ground has been taken up in such form that while the apex is covered, it is covered in such shape as to allow no extralateral rights, and where such is the case the portions of the vein in such position belong to the party whose survey includes them within the vertical planes of his side and end lines.—*Parrot Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386, 53 L. R. A. 491, 21 M. R. 232, 64 P. 326; *State v. District Court*, 25 Mont. 504, 65 P. 1020.

In *Roxanna Co. v. Cone*, 100 F. 168, 20 M. R. 323, the Court refused to enjoin in favor of the common law right of the complaining lode which confessedly had no apex, the owners of all the claims which might assert apex rights not being defendants to the suit.

Exception of Such Veins in Favor of Proprietor of Other Lodes.

In *Pacific Coast Co. v. Spargo*, 16 F. 348, 8 Sawy. 645, 16 M. R. 75, and *Amador Co. v. South Spring Co.*, 36 F. 668, 13 Sawy. 523, it was held that the exception of veins apexing outside, in favor of the proprietors of such veins, should be confined to instances where the rights of such proprietors were in existence at the time of the grant to the patentee

whose claim was underlaid by such veins. But all the later decisions refuse to recognize this distinction, and treat the exception as one standing for the benefit of future as well as present proprietors.—*Turck case, supra; Cheesman v. Hart,* 16 M. R. 263, 42 F. 98.

An Owner May Amend His Survey, Even After Patent

applied for, to keep his vein within his shortened claim, by making a new end line and dropping that portion into which no vein extends.—*Last Chance Co. v. Tyler Co.,* 61 F. 557, 9 C. C. A. 613. And may amend to correct diverging end lines. —*Doe v. Sanger,* 83 Cal. 203, 23 P. 365. The right so to amend is undeniable, but we apprehend, where rights have become vested in the underlie, that such amended end lines would not divest such rights any more than amended surface lines could divest the rights of an intervening overlap. We can see no difference between an estate vested in an extralateral portion of a lode and an estate vested in the surface of the same.

Apex Covered by Several Patents.

Where there are several contiguous patents the dip-right of each must be treated as a separate grant. The two patents can not be considered together so as to treat them as if they were one patent enclosing the apex of the vein.—*Del Monte Co. v. New York Co.,* 66 F. 212, 18 M. R. 188. On the other hand, in *Carson City Co. v. North Star Co.,* 73 F. 598, where the owner of several irregular locations had patented them together they were treated as one claim.

Apex Rights of Group Patent.

A patent conveyed five lodes. The apex of the Los Gazabo, one of the group, covered the apex from end line to end line. The other four lodes were at right angles to the apex so that they had no extralateral rights. The Los Gazabo had been originally located over the other four prior locations, but on

the patent survey, the field notes had conceded the overlap to the Los Gazabo and excepted its area from the other four. The Court held that the field notes could be looked to to explain the patent and that it would be treated as though the Los Gazabo had been located on open ground.—*Round Mtn. Co. v. Round Mtn. Co.,* 36 Nev. 543, 138 P. 71, reversing the opinion reported in 35 Nev. 392, 129 P. 308. The apex rights of each lode were construed as if there had been a separate patent on each claim.

There Can Be but One Set of End Lines, for All the Veins

covered by the patent. And where departure from one or both side lines renders it material, only the discovery vein can be used to determine what are the planes of the end lines. —*Walrath v. Champion Co.,* 171 U. S. 293, 43 L. Ed. 170, 18 Sup. Ct. Rep. 909, 19 M. R. 410; *Cosmopolitan Co. v. Foote,* 101 F. 518, 20 M. R. 497; *St. Louis Co. v. Montana Co.,* 104 F. 664, 56 L. R. A. 725, 44 C. C. A. 120, 21 M. R. 57; *Jefferson Co. v. Anchoria Co.,* 32 Colo. 176, 64 L. R. A. 925, 75 P. 1070; *Clark Montana Co. v. Butte Co.,* 233 F. 548.

The extralateral rights of the discovery vein determine the extralateral right of all side veins.—*Stewart Co. v. Ontario Co.,* 23 Ida. 724, 132 P. 787.

This rule was applied in *Anaconda Co. v. Pilot Butte Co.,* where there were not only two veins and two adjoining patents, but a merger of the veins on the dip.—(Mont.) 156 P. 409.

A single case which seems to decline this rule is *Ajax Co. v. Hilkey,* 31 Colo. 131, 102 Am. St. Rep. 23, 62 L. R. A. 555, 72 P. 447, 22 M. R. 585.

The Doctor Jack Pot Case.

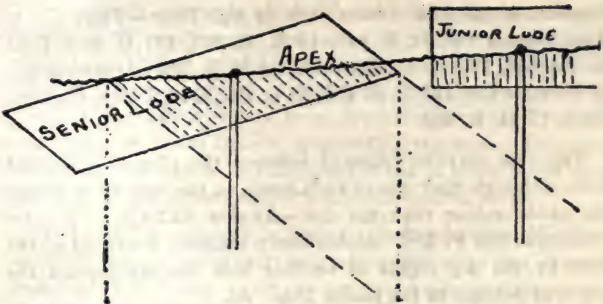
The Doctor Jack Pot M. Co. sued the Work M. Co. to recover two ancillary veins of the Lucky Corner patent alleging that neither one was the discovery vein, and that each of them crossed a side line and an end line of the patent, and had been followed down on their dip into defendant's

ground. The defendant answered that the Lucky Corner never had a lode in its discovery cut, but the Court struck out this part of the answer, saying that there was a conclusive presumption in favor of such discovery, and allowed a verdict for each of the two ancillary veins for the number of feet that each was covered diagonally by the plaintiff's senior patent.

That there was no vein in fact in the discovery cut, it would seem to us ought to be provable when such assumed vein is being used as a basis for claiming and fixing extralateral rights. If it may be shown that the discovery vein leaves its side line, it seems *a fortiori* that a party would be allowed to show that there was no vein there to follow to either end or side line. This would not in the least overthrow the rule that the discovery can not be impeached for the purpose of defeating the patent as a muniment of title. But the decision being affirmed in the Circuit Court of Appeals, 194 F. 620, 114 C. C. A. 392, settles the point adversely to our contention until passed on by the Supreme Court and so we yield to authority, our reason abiding unconvinced.

Relation of End Line to Strike.

The extralateral rights being defined by extending the end lines as parallel vertical planes, it is apparent that unless the end lines are at an exact right angle to the vein, which they rarely are, the grant of the patent is not the grant of the right to follow down on the dip, underneath the same feet of apex enclosed. On the contrary, there must be a gain in one direction and a corresponding loss in the other. The following diagram will illustrate this:



The Senior and Junior lodes above are on the same vein, the Senior located obliquely to the apex. The Junior is correctly laid on the strike of the vein. The Senior is the older patent. By the dashed lines the Senior loses the bottom of its own shaft and cuts off the shaft of the Junior lode. The dotted lines and the shafts, of course, are at right angles to the strike of the vein.

Right to the Vein Within the Four Vertical Planes.

Although where the lode crosses from side line to side line it loses its extralateral rights, the claimant has a certain compensation by being allowed to follow on the dip to his end line.

Where a dipping lode crosses from side line to side line, in following it down, it is obvious that two shafts sunk on the vein at the two points where it leaves the side lines will enclose between them all that part of the vein the apex of which is within the patent.—Lode Y, Plat Q, p. 221.

The right to the part of the lode between such two shafts in going down is lost as soon as the vertical plane of the south side line is reached. This is the ground marked B on Plat Q. The vein below on B the claimant of Lode Y does not own. On the other hand, he retains all of C, which is the vein within the vertical planes of his side lines and end lines.

A patentee following down on the dip can not take the vein where he finds it between vertical side and end lines of a prior

location whose vein crosses both its side lines.—*Tyler Co. v. Last Chance Co.*, 71 F. 848, 18 M. R. 303, 157 U. S. 684, 39 L. Ed. 859, 15 Sup. Ct. Rep. 733, 18 M. R. 205; *Argentine Co. v. Terrible Co.*, 122 U. S. 478, 30 L. Ed. 1140, 7 Sup. Ct. Rep. 1356, 17 M. R. 109.

The vein may be followed between the planes of its end lines although they are at such angle to the vein as to follow the strike rather than the dip.—*Bunker Hill Co. v. Empire State Co.*, 134 F. 268. And where a segment is cut out of the lode by the dip rights of another lode the ore beyond the segment belongs to the junior lode. *Id.*

Following Lode Beyond End Line.

In the *Flagstaff case*, the Federal Supreme Court uses this language: "The side lines of the location are really the end lines of the claim." In *Last Chance Co. v. Tyler*, 157 U. S. 687, 39 L. Ed. 859, 15 Sup. Ct. Rep. 733, 18 M. R. 205, it says "the side lines of that location become the end lines and the end the side lines." The use of this expression is far from holding that extralateral rights may be pursued beyond the end line. In neither of these cases was the ground actually in controversy beyond the end lines of any of the claims in dispute, so that the expressions quoted are only *dicta* in both instances.

The grant of a patent is of a piece of land with an extralateral grant upon a certain condition, to-wit: that its lines enclose the apex of a vein, which vein extends "outside the vertical side lines" of its survey. If its lines enclose such apex from end line to end line or from end line to side line, the condition exists and its extralateral right is established.

In the proposition that where it has a vein going through both side lines it can follow such vein beyond its end line there is no assertion of a condition which, having been fulfilled, some right accrues as the incident to the compliance with the condition.

The statute expressly gives the right to go beyond the side line upon the existence of the condition; it does not give such right to go beyond an end line. Nor is there any known principle of law which would enlarge a grant in derogation of the common law, and therefore to be strictly construed—by allowing the grantee who fails to come within the terms of the condition of his grant to be compensated out of other lands upon the supposition of an implied condition to that effect.

And yet the contrary is strongly contended for (Lindley, sec. 589), and in the only suit where the point has directly arisen, a case arising on an ore contract made in Arizona and sued on in Connecticut, the holding was made that the vein could be pursued beyond its end line.—*Empire Co. v. Tombstone Co.*, 100 F. 910, 20 M. R. 443, 131 F. 339. And it seems to have been allowed in *Conkling Co. v. Silver King Co.*, 230 F. 555.

Also, in *Bunker Hill Co. v. Empire Co.*, 109 F. 538, 48 C. C. A. 665, 21 M. R. 317, the point was conceded to the same effect, but in that case all the claims involved were surveyed squarely across the strike, so that neither had any *status* as to the ore in contention unless it was so conceded.

When a lode is recorded it is a publication to the world that a party claims all veins within its lines with the right to follow on the dip between the end lines protracted. It is, as well, a disclaimer of all other rights. The record shows which lines are claimed as side lines and which as end lines. Subsequent to such location so recorded and published the lode is cut on the dip beyond the located end lines by tunnel. The discoverer by tunnel locates, records and by his own exploitation discloses that he is on a vein, which is found to be within the space between the protracted side lines of a location whose vein has crossed both its side lines, whereupon such location claims the ore by its pretended right to follow the vein beyond its end lines.

We will never concede unless and until compelled by binding authority that by the mere alliteration of language "side

lines become end lines," "end lines become side lines," that the first locator can defeat the rights of such tunnel discovery, but hold that he is estopped by his record to claim the right to pass beyond what he, by his own act, has made his end lines.

Recapitulation—Explanation of Plat Q.

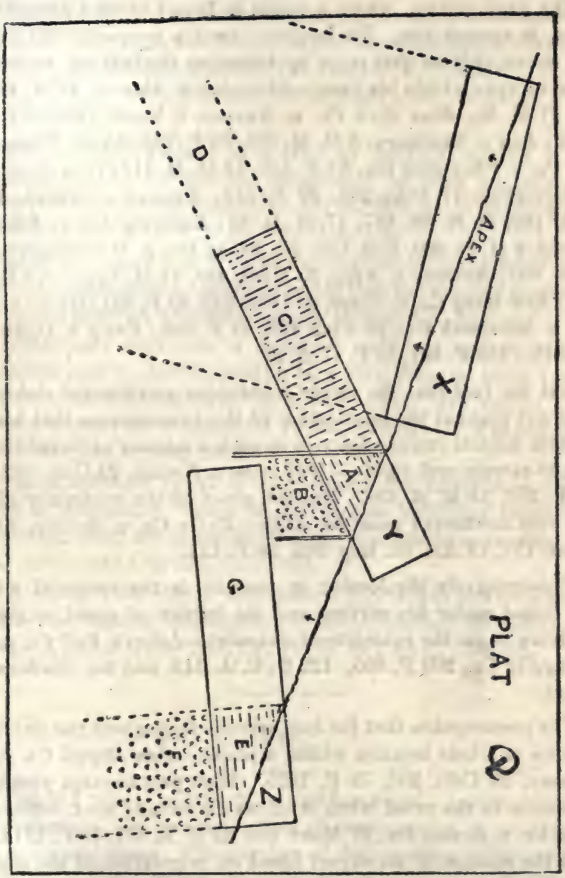
The plat on page 221 will illustrate several of the instances above mentioned. It represents a vein covered by a location from end line to end line; another location where the vein crosses from side line to side line, and a third location where the vein crosses one end line and one side line. The dip of the vein is to the south, that is, to the foot of the plat.

The X location owns, of course, its entire survey and may follow the vein on its dip between its vertical end lines extended downward indefinitely.

Y, whose vein crosses both side lines, owns the vein in the triangle A. He does not own B. On the other hand, he does own C, being that part of the vein between his vertical side and end lines, unless X is the older location, in which case he loses to X the greater part of C.

As to whether Y has any estate in D, being the extension of his vein beyond his end line, is the question discussed on page 218.

Z, whose vein leaves one end line and one side line, is the owner of the parcel E, and the parcel F, the vein on the dip, to the extent of his extralateral rights. He can not follow into G. The vein in G becomes the property of whoever may disclose and locate the apex in the vacant ground between Y and Z.


NORTH
PLAT Q
APEX
D
C
X
A
B
Y
G
E
F
Z

Presumption—Burden of Proof.

The presumption, where a miner is found beyond his side lines, is against him. He is *prima facie* a trespasser till he has shown that he gets there by following the lode on its dip from its apex within his lines.—*Cheesman v. Shreeve,* 16 M. R. 79, 37 F. 36; *Blue Bird Co. v. Murray,* 9 Mont. 468, 23 P. 1022; *Bell v. Skillicorn,* 6 N. M. 399, 28 P. 768; *Cons. Wyoming Co. v. Champion Co.,* 63 F. 540, 18 M. R. 113; *Iron S. Co. v. Campbell,* 17 Colo. 267, 29 P. 513; *Duggan v. Davey,* 4 Dak. 110, 26 N. W. 887, 17 M. R. 59; *Leadville Co. v. Fitzgerald,* 4 M. R. 380, Fed. Cas. No. 8158; *Doe v. Waterloo Co.,* 54 F. 935; *Maloney v. King,* 25 Mont. 188, 21 M. R. 278, 64 P. 351; *Red Wing Co. v. Clays,* 30 Utah 242, 83 P. 841; *Gr. Cent. Co. v. Mammoth Co.,* 29 Utah 490, 83 P. 648; *Keely v. Ophir Hill Co.,* 169 F. 601, 95 C. C. A. 99.

But the fact that the owner is claiming extralateral rights does not prevent the application of the presumption that his surface bounds include his vein in such a manner as to entitle him to extralateral rights.—*Wakeman v. Norton,* 24 Colo. 192, 49 P. 283, 18 M. R. 698. But the proof of the continuity of the vein downward must be made.—*Butte Co. v. Societe,* 23 Mont. 177, 75 Am. St. Rep. 505, 58 P. 111.

Presumptively the locator or patentee is the owner of all ore found under his surface and the burden of proof to the contrary is on the extralateral claimant.—*Liberty Bell Co. v. Smuggler Co.,* 203 F. 805, 122 C. C. A. 113, and the citations *supra.*

The presumption that the lode extends throughout the claim applies to a lode location within a placer.—*San Miguel Co. v. Bonner,* 33 Colo. 207, 79 P. 1025. Such presumption yields of course to the proof when it shows an outside apex.—*Montana Co. v. Boston Co.,* 27 Mont. 288, 22 M. R. 471, 70 P. 1114. But the opinion of an expert based on calculation of the dip through long space of unbroken ground is not enough.—*Heinze v. Boston Co.,* 30 Mont. 484, 77 P. 421; *Collins v. Bailey,* 22 Colo. App. 149, 125 P. 543.

The issue of a patent raises a presumption that the lode has an apex within its lines.—*Iron S. Co. v. Campbell,* 17 Colo. 272, 29 P. 513. And the possession of the apex is the possession of the vein to the full extent of the extralateral right.—*Empire State Co. v. Bunker Hill Co.,* 121 F. 973, 58 C. C. A. 311, 22 M. R. 560; *Montana Co. v. Boston Co.,* 27 Mont. 536, 71 P. 1005.

Parties have a right to a trial by jury on alleged apex rights, and equity has no jurisdiction of such an issue.—*Campbell v. Golden Cycle Co.,* 141 F. 610, 73 C. C. A. 260; *Illinois Co. v. Raff,* 7 N. M. 336, 34 P. 544.

It is not essential in trespass for ore taken from the lode on its extralateral dip to allege in terms that the apex of the vein is within plaintiff's boundaries.—*C. v. G. C. Co., supra.*

What may constitute a discovery sufficient to validate a location may be, and frequently is, a very different thing from what constitutes an apex of a vein which will entitle the owner thereof to extralateral rights.—*Golden v. Murphy,* 31 Nev. 395, 103 P. 394, 105 P. 99.

Much stronger proof is required in the latter case.—*Id.* But in *Daggett v. Yreka M. Co.* it was held that the apex claimant need not necessarily prove a continuous tracing of the vein.—149 Cal. 357, 86 P. 968.

A bill to quiet title to extralateral rights will not lie where there has been no development to show whether they exist or not.—*Keely v. Ophir Hill Co.,* 169 F. 601, 95 C. C. A. 99.

DIP.

Dip is a proper mining term and has a plain and important signification. It means the line of departure of a lode from the perpendicular. The number of degrees may of course be calculated from either the perpendicular or from the horizontal, and the usage with professional surveyors is to calculate the degrees from the horizontal, but miners generally

speak of a lode as dipping so many degrees from the perpendicular, especially when referring to lodes worked by shafts. It is used along with "angles and variations," in the A. C. 1866, and is with those words omitted in the A. C. 1872, but its place is supplied by the phrase (Sec. 2322):

> All veins, * * * throughout their entire depth, * * * although such veins, * * * may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines, of such surface locations.

The term is to so great an extent associated with the terms "apex" and "drainage" that it has been necessarily to a large extent considered under those heads. See APEX and DRAINAGE.

Practical Effect of Dip to Carry the Lode Away from Its Surface Lines.

A lode dipping to the north will gain horizontally to the north about 1.7 feet in 100 feet of descent for each degree from the vertical.

A shaft sunk upon a dipping vein will, in 100 feet depth measured along the dip, acquire the following vertical depths and horizontal departures from the top of the shaft for the following angles, all taken from the horizontal:

ANGLE.	VERTICAL DEPTH.	HORIZONTAL DEPARTURE.
10 degrees	17.4 feet	98.5 feet
20 "	34.2 "	94.0 "
30 "	50.0 "	86.6 "
40 "	64.3 "	76.6 "
45 "	70.71 "	70.71 "
50 "	76.6 "	64.3 "
60 "	86.6 "	50.0 "
70 "	94.0 "	34.2 "
80 "	98.5 "	17.4 "
90 "	100.0 "	0.0 "

Cubic Incidents of Lode Claims.

From the outstart it should be kept in view that a lode claim is a solid body of ground and not a *"superficies."—Massot v. Moses,* 3 S. C. 168, 16 Am. Rep. 697, 8 M. R. 607. Dip is only one of the incidents of this fact. A placer or even a coal bed furnishes few analogies to define the rights of a claim which leaves the surface at once and follows its own course, governed only by its natural but invisible boundaries.

Estate in the Dipping Lode.

Since the dip may carry a lode under the side lines of an adjoining claim, the right to follow such a lode must indicate either: First—An easement to which the adjoining claim is subject, or, rather, Second—An exception out of the estate of the adjoining claim.

The maxim that ownership extends from the surface to the center of the earth in vertical planes, in either event, therefore, does not apply to its full extent. The claim in its downward course is governed by the dip of the vein whose apex appears at the surface; it extends under the vertical planes of the adjoining claims on one side, and on the other side it leaves veins pitching under its own side lines as the property of him who is their owner at the surface.—*Iron Silver Co. v. Cheesman,* 116 U. S. 530, 29 L. Ed. 712, 6 Sup. Ct. Rep. 481.

Where a lode cut in a tunnel has a dip it will be assumed that it carries the same dip to the surface.—*Brewster v. Shoemaker,* 28 Colo. 176, 63 P. 309, 21 M. R. 155.

The Side or Auxiliary Veins, Whose Apices May Be Within the side lines of the claim or patent have the same right to the dip as has the principal or discovery vein.—*Jupiter Co. v. Bodie Co.,* 11 F. 666, 7 Sawy. 96, 4 M. R. 412; *Walrath v. Champion Co.,* 63 F. 552.

No Apex—No Dip.

Any located or patented claim which has been so surveyed that its vein runs practically at right angles to the side lines

can not claim the dip beyond its side lines.—*The Flagstaff case,* 98 U. S. 463, 9 M. R. 607, 25 L. Ed. 253; *McCormick v. Varnes,* 2 Utah 355, 9 M. R. 506; *Argentine Co. v. Terrible Co.,* 122 U. S. 478, 30 L. Ed. 1140, 7 Sup. Ct. Rep. 1356, 17 M. R. 109, and cases cited under APEX. And, as we contend, the same rule controls whenever the angle is enough to carry it across both side lines.

Effect of End Lines.

The end lines of all lode claims are required to be parallel; and where the lode in its descent reaches the end lines protracted, the claim ceases and the dip can not be followed across the protraction of end lines.—*Richmond Co. v. Eureka Co.,* 103 U. S. 839, 26 L. Ed. 557, 9 M. R. 634; *Stone Lode case,* 118 U. S. 196, 30 L. Ed. 98, 6 Sup. Ct. Rep. 1177, 15 M. R. 641. To allow the end lines to diverge is to allow the claimant an ever increasing lineal extent of vein as he descends. Page 207.

When the Grantor Conveys a Claim or Part of a Claim He conveys the right to follow on the dip all veins apexing within the granted ground.—*Stinchfield v. Gillis,* 96 Cal. 33, 30 P. 840, 17 M. R. 497, 107 Cal. 84, 40 P. 98, 18 M. R. 195; *Boston Co. v. Montana Co.,* 89 F. 529. This would seem self-evident in a conveyance of the entire claim or of a claim divided across from side line to side line. But in every mining deed the dip right should be mentioned in express terms.

WALLS.

Defined.

In a contact vein the roof or hanging wall is the plane of the contact above; the floor or foot wall is the plane of the contact below. In fissure veins the walls are the planes of demarcation between the country and the gangue.

Relation to the Country.

It should seem almost self-evident that the nature of the wall must depend upon the nature of the country rock and the nature of the material which it encloses. Between certain rocks the plane of separation would be distinct and traceable; between other rocks a diffusion of the oxides and minerals of the enclosed material through the adjoining country would obliterate more or less all trace of the original plane of division. Where this plane of division is manifest to the eye there is what miners call a wall—where it has become obliterated they say there is no wall. It is therefore manifest that the fact of the absence of one or both walls is, in itself alone, no proof of the non-existence of a vein, they being a mere accidental circumstance. And it has been so decided in the *Lime Lode case,* 116 U. S. 530, 29 L. Ed. 712, 6 Sup. Ct. Rep. 481, and in the *Durant case,* 29 F. 354, 15 M. R. 519. In the former decision, after defining what constitutes a lode as a "body of mineral or mineral-bearing rock within defined boundaries," MILLER, J., adds: "In the existence of such body and to the extent of it, boundaries are implied." In the latter case, in such language as would be used by a lawyer thoroughly familiar with the subject-matter, HALLETT, J., says: "It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such as can be seen."

Broken Ground—Slips—Natural Cleavage.

It is also evident that subsequent disturbance of the vein matter would tend to destroy the continuity of the wall; and in many classes of rock the natural cleavage is such as often to be mistaken for and followed as a wall. In such ground a very little manipulation may be made to show an apparent wall where none, in fact, exists.

Disappearance of Wall.

It is nevertheless true that where a wall has shown itself for some distance and disappears—that is an important item

to be considered where the further continuity of the vein is made doubtful by reason of the simultaneous disappearance of the mineral and an apparent change in the rock which is being followed. See page 45.

Wall or Side of Working.

It is also to be observed that the term "wall" is often used with reference to the actual *side* of a drift, shaft or other working without reference to its association with the vein, and finding mineral by "cutting through the wall" is spoken of by working miners as if it implied no contradiction of terms.

SPURS.

The word spurs is not found in any of the Acts of Congress nor in the patents issued under them. It is a dangerous term, because its meaning is relative, not definite. That which, when first discovered, may be called a spur, may prove to be a better developed vein than the lode from which it strikes off.

But the term found its way into the Colorado Territorial Act of 1866, and is seen in many records; when properly applied it signifies a feeder to, or off-shoot from, a lode. As such it is part and parcel of the lode, at least as far as the side lines of the claim, and if it extended much further it could hardly be called a spur.

A spur is defined (Bainbridge, p. 2, note) as "A lateral branch from the main lead, not returning to it, but losing itself in the surrounding soil."

Though called a spur (which word is apt to be used as a slurring term) it is in law a lode upon which a valid title may be founded if it do in fact show a "well-defined crevice."

Where repeated locations have been made upon a mineral vein it is too late to call it a spur, especially where the law fixes no limit to the size of the vein which may be located, nor

admits comparison of different sizes between conflicting locations.—*Carson City Co. v. North Star Co.*, 73 F. 601.

When the discovery or existence of a lode is in contention, its size, strength, continuity and other like incidents are questions of fact to be found by the jury.—*Blue Bird Co. v. Largey*, 49 F. 289; *Book v. Justice Co.*, 58 F. 106, 17 M. R. 617.

Ore bodies formed off from the fissure do not form separate veins.—*Tombstone M. Co. v. Way Up Co.*, 1 Ariz. 426, 25 P. 794.

ANGLES AND VARIATIONS.

Use in Statutes and Conveyancing.

In Sec. 4, A. C. 1866, the words "angles and variations" were used, and under the act a lode was patented with its "angles and variations." They are neither law terms nor technical mining expressions, but are supposed to cover the digressions of a lode from a straight line, and might be extended to "faults." In arguing the important question arising upon patents under the old law when the vein left the side lines, these words were strongly urged as indicating the intention to pass the vein as the essential grant of the patent. These words, or like terms, are in common use in the phraseology of mining deeds *(Bullion v. Croesus Co.*, 2 Nev. 168, 90 Am. Dec. 526, 5 M. R. 257) but are not words of essential description.

Irregular Surveys With Unnecessary Angles.

A lode may and should be surveyed to cover all its angles. But acute angles such as were attempted in the *Stone Lode*, leading to fantastic figures, widely different from the parallelogram intended in the Act of Congress, even if they have two parallel courses which they call end lines, run a risk of being ruled out of any right to claim beyond their side lines.

In other respects they may be wholly valid if the end lines are regular and the statutory width and length are not exceeded.—*Iron Silver Co. v. Elgin Co.,* 15 M. R. 641, 118 U. S. 200, 30 L. Ed. 98, 6 Sup. Ct. Rep. 1177.

Whether the presumption allowed in ordinary cases *(Armstrong v. Lower,* 6 Colo. 582, 15 M. R. 458), that the survey covers the vein would be indulged to a claim which has acute angles, may be doubted. Such presumption is merely to fix the party on whom is the burden of proof, and on an angled claim ought to yield to very slight evidence.

In the case of the *Jack Pot Lode* the Department required an amended survey where, by assuming a zigzag shape, the width of the claim exceeded 600 feet, and also ruled that a long end line parallel to another end line less than three inches long could not be allowed as a parallel end line within the meaning of the law.—34 L. D. 470.

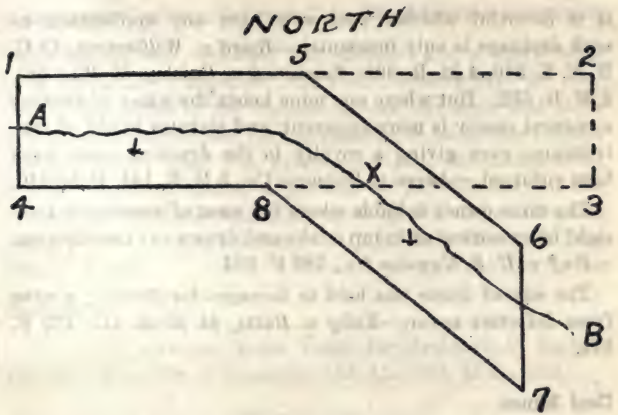
Angles to Allow for Erosion and Slope.

A vein may have an angle of its own, without regard to its dip or the contour of the surface. In such case it is obvious that its survey must have a corresponding angle. If the vein is not only straight, but perfectly vertical, no angles are needed, because a parallelogram will always cover such vein.

Also, where the vein has no angle on its strike, no angle is required where the outcrop is on a flat surface or if the vein runs straight up and down the mountain or if it is on an even slope not sunk by erosion nor heaved by a fault.

But where the vein has a dip and outcrops at an angle to the contour of the surface, there must be an angle in the survey to cover its outcrop.

This is made necessary because erosion has brought the lower part of the vein laterally to a point beyond the plane of the higher parts of the vein.



The above plat is an endeavor to explain the text. A B is a vein dipping to the south on a slope where the east end of the outcrop, and the country with it, has been worn down so that B is considerably lower than A. It is clear that the parallelogram 1, 2, 3, 4 would lose the apex at the point X, but the lines 1, 5, 6, 7, 8, 4 would enclose it within both end lines.

DRAINAGE—FLOODING.

Legislative Control.

Sec. 3.—The general assembly may make such regulations, from time to time, as may be necessary for the proper equitable drainage of mines. —*Colo. Const. Art. XVI.*

Under the above authorization R. S. Secs. 4226-4234 attempt to regulate this subject. Such State control is also recognized in Section 2338 of the U. S. Statutes.

But the subject itself is one of inherent difficulty. The act seeks to provide that where one mine drains another, the mine thus benefited shall pay its proportion of the cost of drainage. Where a tunnel or lower adit drains another mine,

it is doubtful whether such acts have any application, as such drainage is only incidental.—*Baird v. Williamson*, 15 C. B. N. S. 376, 4 M. R. 368; *Townsend v. Peasley*, 35 Wis. 383, 2 M. R. 612. But where one mine hoists the water of another a natural equity is more apparent, and statutes in aid of contribution, even giving a royalty to the draining mine, have been enforced.—*Ahren v. Dubuque Co.*, 5 M. R. 144, 48 Ia. 140.

The mine owner is liable where for want of reasonable foresight he so worked as to tap a lake and drown out the adjoiner. —*Duff v. U. S. Gypsum Co.*, 189 F. 234.

The city of Butte was held in damages for flooding a mine from defective sewer.—*Kelly v. Butte*, 44 Mont. 115, 119 P. 171.

Coal Mines.

Where in case of veins or deposits of the class represented by coal beds, one mine lies under the dip of another mine at a higher level, it is under servitude to the water flow of the mine above.—*Philadelphia Co. v. Taylor*, 5 M. R. 133, 5 Leg. Gaz. 392; *Spadra Co. v. Eureka Co.*, 104 Ark. 359, Ann. Cas. 1914C, 454, 148 S. W. 644.

Servitude of the Lower.

In lode mines the same rule applies—that the lower workings must stand the water from the higher pits, subject to such regulations as the Drainage Act supplies, where such act exists and its provisions can be enforced; and the upper mine can not wantonly cast its water on the lower.—*Locust Co. v. Gorrell*, 9 Phila. 247, 5 M. R. 129. The same rule applies to quarries.—*Ulmer v. Farnsworth*, 15 Atl. 65, 80 Me. 500, 17 M. R. 134.

Breaking Barrier.

The adjoiner is liable for the damage caused by breaking the barrier, but he is not bound to restore it.—*Lord v. Carbon Co.*, 42 N. J. Eq. 157, 6 Atl. 812.

A Drainage Contract Between Two Mines Having a Common

water burden was construed and enforced and a heavy judgment for damages sustained, the Court holding that the relation of the mines to the common enemy was such that there was ample consideration for the promise to contribute; that a promise to pay what was proper and fair, the mines being equally benefited, meant a promise to pay one-half of the expense and that the managing agent of the corporation had power to make such a contract.—*Fisk M. Co. v. Reed,* 32 Colo. 506, 77 P. 241.

Springs.

The mine operator is not liable for drainage of surface springs.—*Sloss Co. v. Sampson,* 158 Ala. 590, 48 So. 493.

DITCHES AND WATER.

Congressional Recognition of Easements.

R. S. Sec. 2339.—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.—*Sec. 9, A. C. July 26, 1866.*

This section not repealed by later acts.—*U. S. v. Utah Co.,* 208 F. 821.

Excepted in Patent.

R. S. Sec. 2340.—All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights as may have been acquired under or recognized by the preceding section. —*Sec. 17, A. C. July 9, 1870.*

Claims Subject to Ditches, Flumes and Trails—Parol License.

R. S. Colo. Sec. 4216.—All mining claims now located or which may be hereafter located, shall be subject to the right of way of any ditch or flume for mining purposes, or of any tramway or pack trail, whether now in use or which may be hereafter laid out across any such location; *Provided, always,* That such right of way shall not be exercised against any location duly made and recorded, and not abandoned prior to the establishment of the ditch, flume, tramway or pack trail, without consent of the owner, except by condemnation, as in case of land taken for public highways. Parol consent to the location of any such easement accompanied by the completion of the same over the claim shall be sufficient without writings; *And Provided further,* That such ditch or flume shall be so constructed that the water from such ditch or flume shall not injure vested rights by flooding or otherwise.—*Feb. 18, 1874.*

Besides the Act of 1866, above printed, Congress allows right of way to ditches, tramways, reservoirs and power lines over the public lands by Act of 1895 and its amendment.—28 St. L. 635, 29 *Id.* 129, 30 *Id.* 404.

The Desert Land Act recognizes the right to divert water for mining and irrigation.—*Caviness v. La Grande Co.,* 60 Or. 410, 119 P. 731.

The Right of the Miner to Divert Water from Its Natural

stream, in opposition to the common law, has been not only granted under the above Act of 1866, but the doctrine of appropriation has now become universally conceded in all the mining and arid states of the Pacific and Rocky Mountain slopes.—*Atchison v. Peterson,* 1 M. R. 583, 20 Wall. 507, 22 L. Ed. 414; *Jennison v. Kirk,* 4 M. R. 504, 98 U. S. 453, 25 L. Ed. 240; *Snyder v. Colo. Co.,* 181 F. 62, 104 C. C. A. 136.

The party who first appropriates the water for mining, irrigation or other beneficial use, obtains the right to use it both as against those who later attempt to tap the stream above, or who need it in the stream below. Neither agricultural nor mining uses have any class priority one over the other. The first in time is the first in right. A homestead or other entry is subject to the rights of a prior appropriation of

water.—*South Yuba Co. v. Rosa,* 80 Cal. 333, 22 P. 222; *Tynon v. Despain,* 22 Colo. 240, 43 P. 1039.

Water diverted in one State will be protected against a later appropriation above although in another State. State lines cut no figure in such case and the appropriation is governed by the laws of the State where made.—*Morris v. Bean,* 146 F. 423.

A Ditch Is an Easement Over the Land which It Crosses.

—*Quinlan v. Noble,* 75 Cal. 250, 17 P. 69. A party can not locate a ditch in such a manner as to prevent the practical mining by hydraulic power, or otherwise, of claims which it crosses; nor so as to cut off the water used by the hydraulic. When ditch crosses ditch, the later claimant must adjust the crossings so as not to interfere with the full use of the prior ditch.—*Jennison v. Kirk, supra.*

Appropriation by Placer Location.

It has been held that a placer location is of itself an appropriation of all the water flowing across it to the extent needed for working it.—*Schwab v. Beam,* 86 F. 41, 19 M. R. 279. This is an extreme holding and seems to us an indefensible position.

Since the above paragraph was in print, *Schwab v. Beam* has been expressly overruled by *Snyder v. Colo. Co.,* 181 F. 68, 104 C. C. A. 136.

Change of Point of Diversion or Place of Use.

The change of locality where water is used does not forfeit the right.—*Maeris v. Bicknell,* 7 Cal. 262, 68 Am. Dec. 257, 1 M. R. 601. The owner may change either the point of diversion or the place of use.—*Telluride v. Davis,* 33 Colo. 355, 108 Am. St. Rep. 101, 80 P. 1051; *Strickler v. Colo. Springs,* 16 Colo. 61, 25 Am. St. Rep. 245, 26 P. 314. If he has prior right to the water he may take it by a new and different ditch. —*Jacob v. Lorenz,* 98 Cal. 332, 33 P. 120; *Greer v. Heiser,* 16 Colo. 306, 26 P. 770.

Intervening Right.

But he can not change the point of diversion or the line of his ditch to the injury of those who have in the meantime acquired rights.—*Last Chance Co. v. Bunker Hill Co.*, 17 M. R. 449, 49 F. 430; *Handy Ditch Co. v. Louden Co.*, 27 Colo. 515, 62 P. 847; *Fuller v. Swan River Co.*, 12 Colo. 12, 16 M. R. 252, 19 P. 836.

The subsequent appropriator who makes his diversion, under the belief that the water appropriated by the senior appropriator will continue to be used as it was until the time of the subsequent appropriation, acquires a vested right to insist on such conditions.—*Baer Bros. Co. v. Wilson*, 88 P. 265, 38 Colo. 101.

Placer water after use was appropriated for irrigation. *Held*, that the miner could not change the point of diversion so as to cut off such second appropriator.—*Head v. Hale*, 38 Mont. 302, 100 P. 222.

A Party May Use the Bed of a Natural Stream as His Means of conducting water added to it by a ditch, without being considered as abandoning the water by mingling it with the original waters of the stream.—*Butte Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769, 4 M. R. 552; *Oppenlander v. Left Hand Co.*, 18 Colo. 142, 31 P. 854.

Location of Ditch Right.

At the point where water is taken from the stream, post notice as follows:

DITCH NOTICE.

MIDLAND DITCH.—I claim 150 inches of the water of this stream, to be taken by ditch from this point to claims on *Wightman's* Gulch, in *Summit* Mining District, *Rio Grande County*, for mining purposes.

January 17, 1916. ALEXANDER G. COCHRAN.

The posting of this notice, where local statutes require no further filings, would, when accompanied by collateral acts showing intention to follow up, give a reasonable time to begin the ditch.—*Dyke v. Caldwell*, 2 Ariz. 394, 18 P. 276.

The ditch should be staked and work commenced and prosecuted with reasonable diligence. If the notice be not followed up within a reasonable time by actual work in carrying out the intended appropriation, it amounts to absolutely nothing.

Unless required by district rule or statute the existence of a record could not be insisted on as a condition of title, where the ditch is actually constructed and continuously used. But record is customary, always advisable, and when made becomes the initial point in the chain of recorded title.

In Colorado, by Act of 1903, R. S. Sec. 3181, duplicate maps and statements are required to be filed with the State Engineer within sixty days after the commencement of actual construction, or the beginning of the survey of the ditch. After approval the State Engineer certifies the duplicate map and statement, returning it to the claimant, who must file it within ninety days from the time stated as the date of commencement, with the Recorder of the county in which the headgate is located.

DITCH STATEMENT.

KNOW ALL MEN BY THESE PRESENTS, That I, *Alexander G. Cochran*, of St. Louis, in the State of Missouri, do hereby declare and publish as a legal notice to all the world that I have a valid right to the occupation and possession of that certain tract or parcel of land lying in Summit Mining District, in the County of Rio Grande, State of Colorado, for ditch and mining purposes, and more particularly described in the map hereto attached. That I have located the MIDLAND DITCH, and do hereby make and file, in compliance with the laws of the State of Colorado, this statement in duplicate, and that the accompanying map, which shows the location of said ditch, forms a part of this filing and is hereby made a part thereof.

First—The headgate is located at a point on the south bank of the Alamosa river, from which it derives its supply of water, whence the N. E. corner of Section No. 31, Township 37, Range 4 East of the New Mexico Principal Meridian, bears N. 45° E. 600 feet.

Second—Said ditch is four feet deep, five feet wide at the top and four feet wide at the bottom; the grade is ten feet per 1,000 feet and the length is 2½ miles.

Third—The carrying capacity of said ditch is 150 cubic feet per second of time.

Fourth—Work was commenced on said ditch on the 17th day of January, 1916.

(Claimant may take either date of survey or date of actual construction begun for this paragraph.)

Fifth—The estimated cost of ditch is $3,000.

ALEXANDER G. COCHRAN.

STATE OF COLORADO, County of *Fremont:* ss.

Alexander G. Cochran, being first duly sworn, deposes and says that he is the claimant of the within named ditch and water-right; that he has read the foregoing statement and has examined the accompanying map, and that the same are true to the best of his knowledge and belief.

ALEXANDER G. COCHRAN.

Subscribed and sworn to before me this 1st day of February, A. D. 1916.

George W. Clelland,
Notary Public.

The map accompanying the above statement is required to be on white linen drawing paper, 24 by 36 inches in size, with a two inch margin on the left side, and should show the following:

First—The location of the headgate by course and distance to a corner of the public survey, or if upon unsurveyed land, to some natural object, so that the same may be easily located.

Second—The general course and the name of the stream.

Third—The route of the ditch by course and distance.

Fourth—The legal 40 acre subdivisions and other patented lands.

Fifth—The ownership of all lands crossed by the ditch or canal.

And should also contain the following:

AFFIDAVIT OF SURVEYOR.

STATE OF COLORADO, County of *Fremont:* ss.

E. E. Chase, being duly sworn on oath, deposes and says that he is the engineer (or surveyor) of the MIDLAND DITCH; that the survey of the same and the map thereof was made by him (or that such map was made under his instructions), and that such survey is accurately represented upon this map; that he has read the statement thereon, and that the same is true of his own knowledge.

E. E. CHASE,
Engineer (or Surveyor).

Subscribed and sworn to before me this 1st day of February, A. D. 1916.

George W. Clelland,
Notary Public.

When it is impracticable to make a complete survey and maps within the sixty day period, temporary maps may be filed with the statements, to be supplemented by a detailed map when the survey is completed.

When local statutes do not require other details or the filing of maps the above statement would be a valid location certificate of ditch rights, by incorporating into the statement a description of the course of the ditch, and omitting reference to the map.

The appropriation of water in most of the States is now, 1916, regulated or attempted to be regulated by statutes not at all uniform. Such statutes must be consulted in connection with the general principles in this chapter indicated.

How Conveyed.

Right to water appropriated may be transferred like other property. A ditch is real estate and is conveyed by deed. —*Smith v. O'Hara,* 1 M. R. 671, 43 Cal. 371; *Bradley v. Harkness,* 26 Cal. 69, 11 M. R. 389; *Burnham v. Freeman,* 11 Colo. 601, 17 P. 761, R. S. Colo. Sec. 669.

Appurtenance.

Whether a deed of land conveys the ditches and water rights depends upon the intent of the grantor, and may be implied where the use is necessary to its beneficial enjoyment.—*Arnett v. Linhart,* 21 Colo. 188, 40 P. 355; *Gelwicks v. Todd,* 24 Colo. 494, 52 P. 788. The water right goes with the sale of a mill site.—*N. A. Co. v. Adams,* 104 F. 404, 45 C. C. A. 185, 21 M. R. 65. The ditch was held no appurtenance in *Quirk v. Falk,* 47 Cal. 453, 2 M. R. 19, and *Ginocchio v. Amador Co.,* 67 Cal. 493, 8 P. 29.

Whether a certain ditch is an appurtenance to land conveyed by deed may be proved by parol evidence.—*Fayter v. North,* 30 Utah 156, 6 L. R. A. (N. S.) 410, 83 P. 742.

It has become a rule of property in Montana that "a water right is appurtenant to the land upon which it is used."—*Leg-*

gat v. Carroll, 30 Mont. 384, 76 P. 806. A patent does not divest ditch rights.—*Dodge v. Marden*, 7 Or. 456, 1 M. R. 63. The right granted under the A. C. 1866 was not confined to ditches then in existence.—*Jacob v. Lorenz*, 98 Cal. 332, 33 P. 119.

A Ditch May Be Abandoned Without Necessarily Abandoning the water which it carried.—*New Mercer Co. v. Armstrong*, 21 Colo. 357, 40 P. 989. Non-user of ditch does not necessarily amount to abandonment.—*Welch v. Garrett*, 51 P. 405, 5 Ida. 639, 19 M. R. 193.

Buyer Must Take Notice of.

A ditch is a physical and visible monument, and doubtless the grantee of land crossed by a ditch buys with presumptive notice of its existence.—*Oregon Co. v. Trullenger*, 3 Or. 1, 4 M. R. 247; *Lampman v. Milks*, 21 N. Y. 505.

Relation.

When a ditch is made for the appropriation of water, the right relates back to the commencement of the work on the ditch, if the same be completed within a reasonable time. —*Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 357, 1 M. R. 601; *Irwin v. Strait*, 18 Nev. 436, 4 P. 1215.

But if the ditch be not completed with due diligence, the right only accrues from the time the water is actually appropriated.—*Ophir Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550, 4 M. R. 640. Facts stated and held to amount to due diligence. —*Oviatt v. Big Four Co.*, 39 Or. 118, 65 P. 811; *Sand Point Co. v. Pan Handle Co.*, 83 P. 347, 11 Ida. 405. And the ditch has a right of way over claims located across its line after work commenced, but before completion.—*Miocene D. Co. v. Jacobsen*, 146 F. 680, 77 C. C. A. 106.

Until claimant of water is in a position to use the water he can not claim damages against a party diverting or using it. —*Miles v. Butte Co.*, 3 Mont. 56, 79 P. 549.

In *Thorndyke v. Alaska M. Co.*, 164 F. 657, 90 C. C. A. 473, the district rule required that the appropriator of water must "work diligently and uninterruptedly to completion." On the facts the ditch owner was held to have not abandoned his water rights, under this rule.

One who takes up land left vacant by the death of a squatter who had no heirs, does not succeed to the water rights appropriated by the squatter.—*Head v. Hale*, 38 Mont. 302, 100 P. 222.

Surplus Water.

Ditch owner must return surplus.—*Stanford v. Felt*, 71 Cal. 249, 16 P. 900. After user by placer miner it must be let go to claims below.—*Alder Gulch Co. v. Hayes*, 6 Mont. 31, 9 P. 581. Waste water defined.—*Byrne v. Crafts*, 73 Cal. 641, 15 P. 300.

The flowage of water from a tunnel is a subject for appropriation, and, where a party appropriated water from a tunnel, which was afterwards undercut by a lower tunnel, the water of which it also appropriated, its right, by relation, went back to the original appropriation.—*Ripley v. Park Center Co.*, 40 Colo. 129, 90 P. 75. But such appropriation does not impose any obligation on the tunnel owner.—*Cardelli v. Comstock Co.*, 26 Nev. 284, 21 M. R. 699, 66 P. 950; the same as to water from the sluice of a placer claim and tapped on the owner's ground by his license.—*Fairplay Co. v. Weston*, 67 P. 160, 29 Colo. 125, 21 M. R. 725.

Water flowing from an abandoned artesian well on the public domain is subject to appropriation.—*De Wolfskill v. Smith*, 5 Cal. App. 175, 89 P. 1001.

Parol License to Construct.

Where a ditch is constructed on government land or over the land of persons who give their consent, no condemnation proceedings are necessary; the ditch once constructed becomes a lawful easement; or the consent may be treated as giving title

by estoppel.—*Yunker v. Nichols,* 8 M. R. 64, 1 Colo. 551. With or without the aid of this or like decisions it remains clear that a ditch over the public land requires the consent of no person, the federal consent being given by law, that verbal consent is commonly taken as sufficient over possessory claims and that when by its construction it becomes a fixed easement, even the patented title recognizes the validity of the title to such ditch. —*Tynon v. Despain,* 22 Colo. 240, 43 P. 1039; *Stoner v. Zucker,* 148 Cal. 516, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 P. 808.

The term "miner's inch" may be explained by parol testimony. *Ulrich v. Pateros Co.,* 67 Wash. 328, 121 P. 818. See GLOSSARY.

Condemnation Where Necessary.

Where it is to be built across claims or other lands whose owners refuse consent, condemnation proceedings are necessary under the Eminent Domain Acts, notwithstanding the right of way granted to ditches by the Act of 1866. (R. S. 2339.) A ditch, when carried across mining claims already located, must recognize their prior possessory rights and pay damages as in other cases of condemnation.—*Titcomb v. Kirk,* 51 Cal. 288, 5 M. R. 10; *Jennison v. Kirk,* 98 U. S. 453, 25 L. Ed. 240, 4 M. R. 504; *Noteware v. Sterns,* 1 Mont. 311, 4 M. R. 650. It seems not necessary that the ditch owners should incorporate to condemn a right of way for ditches, though incorporation in such cases is usual and is always assumed to be necessary in the absence of constitutional provisions dispensing with it, such as Sec. 7, Art. XVI, Colorado Constitution.

The flooding of land by a reservoir for supply of power to mines and smelters and for irrigation is a public use.—*Helena Power Co. v. Spratt,* 35 Mont. 108, 10 Ann. Cas. 1055, 88 P. 773.

Where a ditch was constructed without objection from the owners of the mining claims it crossed, but without condemnation proceedings, an attempt by the mine owners to destroy the ditch will be enjoined. The mine claimants are entitled to

damages only.—*Miocene D. Co. v. Jacobsen,* 146 F. 680, 77 C. C. A. 106.

Irrigation Ditches Are Granted the Same Rights of Way and the same right to appropriate water as ditches for mining purposes under section 2339 above printed. Neither has any class priority over the other.—*Union Co. v. Dangberg,* 81 F. 73. The first in time is first in right. They may in general be located and recorded in the same form as a mining ditch, except when otherwise regulated by statute.

The Colorado Act applies to reservoirs and ditches for any beneficial use and for the enlarging of the same. The form on page 236 is sufficient for an irrigating ditch by changing the purpose of the use.

Contract to enlarge a ditch so that it would be filled from a certain river construed to mean to make a ditch of a certain capacity and not a guaranty that the water would be there to fill it.—*Flick v. Hahn's Peak Co.,* 16 Colo. App. 485, 66 P. 453.

A party contracting to supply water to a placer mine must furnish water fit for the purpose, and if the water furnished has come from a placer above, the duty is upon him to provide the necessary reservoirs to settle it.—*Gold Ridge Co. v. Tallmadge,* 44 Or. 34, 102 Am. St. Rep. 602, 74 P. 325.

Using such water as furnished was no waiver of damages for its defects.—*Id.*

For form of incorporation of ditch company see p. 402.

RIGHT OF WAY AND OTHER EASEMENTS.

State Power to Regulate Easements.

R. S. Sec. 2338.—As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.—*Sec. 5, A. C. July 26, 1866.*

Highways.

R. S. Sec. 2477.—The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.—*Sec. 8, A. C. July 26, 1866.*

By the terms of the above section 2477, roads and trails may be established without any license or formality over the public domain.—*Hobart v. Ford,* 15 M. R. 236; 6 Nev. 77.

By a very early statute in Colorado all claims are made subject to the right of way for hauling quartz (R. S. Sec. 4215), and by section 4216 parol license to build a road is valid without deed. Where such statutes do not exist at the time when a location is made the estate of the miner in his claim is exclusive and a road can not be laid across it, without his acquiescence, except by condemnation under the Eminent Domain Acts with compensation in damages.—*Titcomb v. Kirk,* 5 M. R. 10, 51 Cal. 288.

Except where granted by the above section, 2477, or allowed by State statute enacted under the permission of section 2338 (which has a very limited scope) the title to an easement must be created by deed or other writing. That is to say, it is within the Statute of Frauds. It is true an easement may sometimes be sustained by estoppel or as an executed license, but if a good title is sought at the outstart it should be secured in writing in every instance.—*Highland Boy Co. v. Strickley,* 116 F. 852, 54 C. C. A. 186.

Where a claim over which an easement exists is abandoned the rights of the holder of the easement are paramount to those of a relocator of the same land.—*Bonner v. Rio Grande S. R. Co.,* 31 Colo. 446, 72 P. 1065; *Tuolumne Co. v. Maier,* 134 Cal. 583, 66 P. 863, 21 M. R. 678.

A Mineral Patent Does Not Divest a Valid Highway Already

on the ground when patent was applied for. And when construed in connection with the Act of Congress and the power of the State to regulate easements it would seem that the patent would be subject to any valid subsisting easement

affecting the ground prior to the application. Such an easement saves itself and needs not to be protected by filing an adverse claim.—*Rockwell v. Graham,* 9 Colo. 36, 10 P. 284, 15 M. R. 299; *Jacob v. Day,* 111 Cal. 571, 44 P. 243.

Deed in general terms giving right of way to a mining company to get mineral construed to authorize a tramway and also the right to change the line of the tramway.—*Duncan v. American Co.,* 30 Ky. Law Rep. 84, 97 S. W. 392.

Annual Labor.

The building of trails or roads for the benefit of a claim counts as annual labor or towards making up the $500 improvements required before patenting. See page 121.

One Tenant in Common Can Not by His Deed or License

create an easement over the common claim in favor of a stranger.—*Pfeiffer v. University,* 74 Cal. 156, 15 P. 622. Nor has the general manager of a mine power to grant an easement.—*Butte Co. v. Montana Co.* (Mont.), 55 P. 112.

A co-tenant has no right to use a drift on the vein as a tunnel to convey ore from outside property owned by himself alone.—*Laesch v. Morton,* 38 Colo. 171, 120 Am. St. Rep. 106, 87 P. 1081, 52 Colo. 541, 125 P. 498. Nor to maintain a pipe line across the common ground for any purpose other than the mining of it.—*Pioneer Co. v. Shamblin,* 37 So. 391, 140 Ala. 486.

Congressional Grant of Easements.

By various Acts of Congress the right of way over the public domain is given to tramways, canals, ditches and lines for distribution of electric power, with provisions for reservoirs and power sites. The departmental regulations concerning the same are scattered, and necessarily so, on account of the overlapping and conflicting acts which grant them. We refer to the later rulings, as follows:

Ditches.

Ditch rights under Act of March 3, 1891, 26 Stat. L. 1095, and Act of May 11, 1898, 30 Stat. L. 404, are considered in 42 L. D. 111, 217, 562 and 595.

Regulations as to petition for ditch rights are found in 41 L. D. 13.

No company will be recognized as an applicant for ditch rights until the formal presentation of an application for a specific right of way. 40 L. D. 125.

Want of diligence forfeits reservoir and other irrigation rights. 38 L. D. 175, 39 L. D. 27, 309.

Government may appropriate water and cut out later assertions of right to the same. 39 L. D. 334.

Practice of the Department where water rights are disputed by rival applicants. 37 L. D. 152.

Pipe Lines.

Rights of way to pipe lines are considered in 41 L. D. 138 and 43 L. D. 110.

Power Sites, Telephones, Telegraphs.

Regulations on petitions for power lines, telegraph and telephone lines are found in 40 L. D. 30, 41 L. D. 150, 454, 532, and 42 L. D. 465. Power sites, rules and decisions concerning. 39 L. D. 209. In 41 L. D. 532, amended, 42 L. D. 348 are found detailed regulations concerning applications for power sites. (See also 42 L. D. 562.)

Rental charge on electrical transmission lines changing regulation 8 as found in 41 L. D. 454. 44 L. D. 335.

Forest Reserves.

Rights of way over forest reserves are considered in 43 L. D. 448.

The approval of an easement within a forest reserve is only advisory to the Secretary of the Interior and does not oust his jurisdiction as to the title. 40 L. D. 380.

The right of way act of February 1, 1905, 33 Stat. L. 628, concerning ditches and other easements is operative within the forest reserves in Alaska. 40 L. D. 426.

Easements in General.

R. S. Sec. 2338 as to easements created by State laws is printed on page 243, and R. S. Sec. 2339 confined to water rights on page 233.

In 36 L. D. 567-591 is found a recapitulation of rules and practice concerning all kinds of easements, with forms.

Protest, Forfeiture.

Rules for practice in cases of protest against power applications are found in 41 L. D. 590.

Regulation of proceedings by the United States to forfeit rights of way. 39 L. D. 480.

If a contested land entry has been set aside by judicial decision and the title restored to the government, no application will be received on the same until it has been noted on the Land Office records. 38 L. D. 597.

After the five year period in the Act of March 3, 1891, 26 Stat. L. 1095, and Act of May 11, 1898, 30 Stat. L. 404, judicial proceedings must be taken to forfeit the right. 38 L. D. 207.

Procedure of Department on protest against oil applications is found in 44 L. D. 420.

Reservations in Patents.

The reference in the patent to the reservation of easements is considered in 40 L. D. 28 and 44 L. D. 412.

By A. C. May 21, 1896, 29 St. L. 127, oil pipe lines in Colorado and Wyoming are given free right of way over public land.

For right of way over national forest a special permit must be secured. 43 L. D. 448.

Interstate Commerce.

Void Pipe Line Act of Oklahoma.—To forbid the doing of acts in themselves harmless and which are absolutely essential to the enjoyment of property amounts to confiscation. *Haskell v. Cowham,* 187 F. 403, 109 C. C. A. 235; *Oklahoma v. Kansas Co.,* 221 U. S. 230, 35 L. R. A. (N. S.) 1193, 55 L. Ed. 716, 31 Sup. Ct. Rep. 221.

Pipe lines are common carriers. *Prairie Oil Co. v. U. S.,* 204 F. 798.

Eminent Domain.

Acts to condemn ditches are found in all the arid States.

By Colorado Act of 1907, R. S. 2438, an aerial tramway, or pipe line for public use, is allowed to condemn its right of way. The validity of such statutes depends upon whether mining is a public use; for, if not a public use, the statute is void. The tendency of the decisions is to sustain them.—*Clark v. Nash,* 198 U. S. 361, 4 Ann. Cas. 1171, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676. A private tramway may not be condemned. —*People v. Dist. Ct.,* 11 Colo. 147, 17 P. 302.

It has been held a public use in Nevada.—*Dayton M. Co. v. Seawell,* 11 Nev. 394, 5 M. R. 424; *Byrnes v. Douglass,* 19 M. R. 96, 83 F. 45, 27 C. C. A. 399. And in Utah, *Highland Boy Co. v. Strickley,* 28 Utah 215, 107 Am. St. Rep. 711, 3 Ann. Cas. 1110, 1 L. R. A. (N. S.) 976, 78 P. 296. And in Montana, *Helena Power Co. v. Spratt,* 35 Mont. 108, 8 L. R. A. (N. S.) 567, 88 P. 773. In *Byrnes v. Douglass* a tunnel was condemned.

But otherwise in California; *Cons. Channel Co. v. C. P. R. Co.,* 51 Cal. 269, 5 M. R. 438; *Amador M. Co. v. Dewitt,* 73 Cal. 482, 15 P. 74; *Sutter County v. Nicols,* 93 P. 872, 152 Cal. 688, 15 L. R. A. (N. S.) 616.

Ground for deposit of tailings may be condemned. *Goldfield Co. v. Old Co.,* 38 Nev. 426, 150 P. 313. A railroad to a mine is a public use. *Kipp v. Davis Daly Co.,* 41 Mont. 509, 36 L. R. A. (N. S.) 666, 110 P. 237. A pipe line to carry oil or

natural gas may be condemned as a public use. *City of LaHarpe v. Elm Co.*, 69 Kan. 97, 76 P. 448.

A distinction has been made where the easement is intended only for the private benefit of the condemnor and where intended to supply the public generally, being allowed in the latter instance and denied in the former.—*Great Western Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765; *Miocene D. Co. v. Lyng*, 138 F. 544, 70 C. C. A. 458.

Provision for condemnation by electric power companies and by mines seeking to connect with railroads is found in the Colorado R. S., Secs. 2459, 2460. Any mine owner may condemn land to connect with a railroad. Sec. 2464.

The measure of damages where a quarry is condemned is the value of the stone in place.—*Cole v. Ellwood Co.*, 65 Atl. 678, 216 Pa. 283.

Right of Way to Tunnel.

See TUNNEL SITE.

DUMP.

The Right to Dump Is But Little If At All Affected by statutory regulations, and the right to dump, as of necessity or by custom, across lower claims, has never been brought under the adjudication of the Court of last resort in any of the mining States, to the writer's knowledge; but in the case of *Equator Co. v. Marshall Co.*, U. S. C. Ct. Colorado, an action brought to restrain the dumping across a claim lying below on the mountain slope, it was *held*, as of course, that it was no case for injunction, unless where work was being prevented, shafts filled, life endangered or other gross and continuing injury, and the remedy, if any, was by action at law for damages.

In a later suit in the same Court between the same parties it was *held* that when continuous dumping had been carried on by owners and lessees, without proof or attempt at proof, as to the injury done by each party, that only nominal damages could be recovered against an owner, and that the owners were not responsible for the injuries done by their lessees; and there being no proof that the defendant, one of the owners, had ever taken an active part in the management of the mine, the jury found for the defendant.—See also *Little Schuylkill Co. v. Richards,* 10 M. R. 661, 57 Pa. 142, 98 Am. Dec. 209.

In the case of continuous and indiscriminate dumping over lower claims it may, if not in the meanwhile regulated by statute, be finally recognized as a controlling custom and so fixed as a permanent easement on the lower claims.

In the case of careless or wanton injury to improvements the upper claim is, of course, liable; but the right to dump over unimproved and valueless surface ground is doubtless such an easement as may be prescribed by State statute under the permission of R. S. Sec. 2338, *ante* p. 243, or allowed by district rule.

The owner of a gypsum bed can not make his neighbors' land a convenience to dump his waste on.—*White v. Lansing,* 119 App. Div. 584, 103 N. Y. Supp. 1040; and having covered up an acre of such ground defendant was decreed to remove it or pay damages at plaintiff's election. But the damages in cases when the cost of removal would exceed the value of the land can not exceed the amount of such value.—*Harvey v. Sides M. Co.,* 1 Nev. 539, 90 Am. Dec. 510, 10 M. R. 107.

A Dump Is Real Estate and Passes to the Grantee Without special mention. *Savage v. Nixon,* 209 F. 122; *Steinfeld v. Omega Co.,* 16 Ariz. 230, 141 P. 847. But a contract to sell the ore found in it need not necessarily be by deed.—*Smart v. Jones,* 15 Com. Bench, N. S., 717; *Manson v. Dayton,* 153 F. 258, 82 C. C. A. 588.

A dump of slag is real estate, but may be treated by the owner as personalty and sold and delivered as such.—*Manson*

v. Dayton, 153 F. 258, 82 C. C. A. 588. Dump deposited on the land of another and allowed to remain indefinitely becomes parcel of the land.—*Lacustrine Co. v. Lake Guano Co.*, 82 N. Y. 476; *Erwin's App.*, 12 Atl. 149, 16 M. R. 91. A deposit of tailings becomes an accretion to the land.—*Rogers v. Cooney*, 14 M. R. 85, 7 Nev. 213.

Under a mining lease in general terms the lessee has the right to work over the dump, but the wording of the lease may be such as to exclude dumps by construction.—*Boileau v. Heath*, L. R. (1898), 2 Ch. 301; *Genett v. Delaware Co.*, 14 App. Div. 177, 43 N. Y. Supp. 589, 122 N. Y. 505, 25 N. E. 922.

The right to dump may be lost by allowing adverse possession of the ground for the statutory period.—*McLaughlin v. Del Re*, 71 Cal. 230, 16 P. 881. Ejectment lies to recover ground used for tailings.—*Campbell v. Silver Bow Co.*, 49 F. 47, 1 C. C. A. 155.

The lessee has no property in the dump after his term has expired; nor, during term, to minerals not contemplated in his lease.—*Erwin's App.*, 16 M. R. 91, 12 Atl. 149; *Doster v. Friedensville Co.*, 21 Atl. 251, 140 Pa. 147.

Construction of contract to work dump.—*Foster v. Lumbermen's Co.*, 36 N. W. 171, 68 Mich. 188.

Appurtenance.

It has been held that the grant of a tunnel right carries with it as an appurtenance the right to dump on the grantor's land at the mouth of the tunnel.—*Scheel v. Alhambra Co.*, 79 F. 821, 18 M. R. 616; *Himrod v. Ft. Pitt Co.*, 220 F. 80, 135 C. C. A. 648.

Dump rights and the easement of the right to work through adjoining ground are appurtenances which pass on foreclosure of a mechanic's lien.—*Park County v. Comstock Co.*, 36 Utah 145, 103 P. 254.

MINERAL LAND.

Contests With Non-Mineral Claims.

The question: What is mineral land? arises in contests between mineral and agricultural claimants, between mill site and lode claimants, in timber cutting cases, indirectly in contests as to the exception of known lodes from placers and in other instances. Where it is the duty of the land department to decide this point before they issue patent their decision is final.—*Gale v. Best,* 78 Cal. 235, 12 Am. St. Rep. 44, 20 P. 550, 17 M. R. 186; *Traaphagen v. Kirk,* 30 Mont. 562, 77 P. 58; *Paterson v. Ogden,* 141 Cal. 43, 99 Am. St. Rep. 31, 74 P. 443, 34 L. D. 401.

Title to known mineral land can not lawfully be procured by agricultural entry.—*Murray v. White,* 42 Mont. 423, Ann. Cas. 1912A, 1297, 113 P. 755.

Lands containing minerals of sufficient value to warrant expenditure are disposable only under the mining laws, although they may possess a possibly greater value for other purposes. 43 L. D. 248.

The Surveyor General's return cuts but little figure in a mineral or non-mineral contest. 39 L. D. 491; 45 L. D. 25.

Evidence that land in the vicinity is mineral is admissible as proof of the mineral character of the land in controversy. —*U. S. v. Rossi,* 133 F. 380, 66 C. C. A. 442.

On the other hand it is held that a man may enter land as agricultural where no oil has been actually discovered on the tract although oil is found in the neighborhood and the entryman selected it for its supposed mineral values.—*Olive Co. v. Olmstead,* 20 M. R. 700, 103 F. 568; *Bay v. Oklahoma Co.,* 13 Okla. 425, 73 P. 936.

The subsequent discovery of mineral after a vested right in a non-mineral location does not invalidate the location.— *Cleary v. Skiffich,* 28 Colo. 362, 89 Am. St. Rep. 207, 21 M. R. 234, 65 P. 59. Discovery of coal after entry will not defeat the

issue of his patent to a homestead claimant.—21 L. D. 92; *Colo. Co. v. U. S.*, 123 U. S. 308, 31 L. Ed. 182, 8 Sup. Ct. Rep. 131. The test in agricultural contests is one of comparative values.—*Hunt v. Steese,* 75 Cal. 621, 17 P. 920. A discovery justifying further exploration makes the land mineral.—19 L. D. 455.

Discovery of colors and fairly good prospects is not enough to establish the mineral character of land as against a prior homestead entry.—*Steele v. Tanana Mines,* 148 F. 678, 78 C. C. A. 412.

It is not necessary that immediate profitable mining could be carried on to make the premises mineral land.—*Madison v. Octave Oil Co.,* 99 P. 176, 154 Cal. 768.

The mineral value of the land, to defeat an agricultural entry, must be substantial. Abandoned works are not enough. —*U. S. v. Blackburn,* 5 Ariz. 162, 48 P. 904.

Pumice deposit is mineral land. 41 L. D. 584.

Ordinary clay or limestone of no special value does not make the land mineral. 41 L. D. 314. The same as to rock of no pecuniary value. 41 L. D. 655.

Sand and gravel are not minerals in a homestead contest. 39 L. D. 310.

Value for gypsum makes the land mineral. 29 L. D. 181; 27 L. D. 57. *Madison v. Octave Oil Co., supra.*

The department in a circular letter, dated Nov. 30, 1908, concerning the Timber and Stone Act, gave a formal definition of non-mineral lands as follows:

> Non-mineral lands are such lands as are not known to contain any substance recognized and classed by standard authorities as mineral, in such quantities and of such qualities as would, with reasonable prospects of success in developing a paying mine thereon, induce a person of ordinary prudence to expend the time and money necessary to such development.—*37 L. D. 290.*

Coal Lands.

Coal lands are "mineral lands" as that term is generally used in the disposal of the public domain.—*U. S. v. N. Pac. Ry.*, 170 U. S. 498.

Phosphates.

Phosphate land is mineral land and as such excepted from railroad grants. 26 L. D. 600. And phosphate is such mineral value as will suffice to cancel a homestead entry. 18 L. D. 58.

Jurisdiction to Determine.

The Department retains jurisdiction to inquire into the mineral character of land until patent issues. 41 L. D. 520.

The ruling of the Land Department in a contest that the land is non-mineral, in the absence of fraud or mistake, is binding on the Courts and not subject to collateral attack. —*Old Dominion Co. v. Haverly*, 11 Ariz. 241, 90 P. 333; *Le Fevre v. Amonson*, 11 Ida. 45, 81 P. 71.

Where fraud is alleged it must be extrinsic to the issue passed upon by the Department.—*Cragie v. Roberts*, 6 Cal. App. 309, 92 P. 97.

A court has no jurisdiction to restrain the officers of the Land Department in their proceedings to ascertain the mineral character of land, although the same be held by plaintiff under the mining act.—*Cameron v. Weedin*, 226 F. 44.

It is the province of the Land Department to determine what land is mineral and what is non-mineral.—*Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692; *Wright v. Hartville*, 13 Wyo. 497, 81 P. 649, 82 P. 450; *Nevada Co. v. Spriggs*, 41 Utah 171, 124 P. 770.

But in a contest between a lode and a placer, the Court must necessarily decide to which class the ground belongs. —*Duffield v. S. F. C. Co.*, 205 F. 481, 123 C. C. A. 548. And the Court can relieve against a manifest mistake of law by the Land Office.—*West v. Timber Co.*, 210 F. 189.

Severed Title in United States.

By A. C. of July 17, 1914, provision is made to allow agricultural entry of lands withdrawn as phosphate, nitrate, potash, oil, gas or asphalt, with a reservation of the title of the United States to such minerals. 38 St. L. 509.

Such lands may be prospected upon giving bond to protect the agricultural claimant, and there are sundry provisions naturally incident to this novel idea of partnership in the title to the public lands.

Where the patent itself contains a mineral reservation it is not conclusive evidence that the land is non-mineral.—*Eastern Co. v. Willow River Co.*, 187 F. 466.

Mines and Quarries at Common Law.

The term "mine" is generally applied to an excavation for mineral which enters cover as distinguished from a "quarry" which is supposed to be a working for the removal of rock, layer by layer, from the surface down without getting under roof. But this distinction is not universal; for, under certain systems of working and in certain formations, even a fissure vein may be exploited by a continuous open trench, and there are excavations for the extraction of slate which are subterranean. It is also obvious that a placer working is as much a mine as a lode mine and such workings are always open, barring the method of placer mining known as "drifting."

An exhaustive history of the etymology of these words as well as the legal distinctions between them is found in the first chapter of "MacSwinney," the leading English authority on mining law, and Mr. Costigan in his excellent "Handbook on American Mining Law" explains with great clearness the meaning of these words as used in the United States, and their various equivalents or alternative forms, as "location," "claim," "prospect" and "valuable mineral deposit."

The generic term "mines" is not confined to subterraneous excavations nor the word "minerals" to metallic deposits.—*Nephi Co. v. Juab County* (Utah), 93 P. 53.

The meaning of the words "fully developed mine" is discussed in *People v. Whalen*, a false pretense case, 98 P. 194, 154 Cal. 472.

In *Guffey Pet. Co. v. Murrel*, the definitions of mine, quarry and ore are given with the ruling that an oil well is not a mine. —127 La. 466, 53 So. 705. Drilling for oil is not mining. —*Kreps v. Brady*, 37 Okla. 754, 47 L. R. A. (N. S.) 106, 133 P. 216.

Opened and New Mines.

At common law everywhere a life tenant can work a mine opened and worked before he succeeded to the life estate, but can not open a new mine nor even work a mine which had become disused. We would consider claims on the public domain under the mining acts, whether patented or only located, to be opened mines. They could not become legal claims until worked at least enough to disclose the vein or placer values. The annual labor requirement and the essential $500 improvements also enforce this conclusion. See *Seagar v. McCabe*, 92 Mich 186, 52 N. W. 299, 16 L. R. A. 247; *Poole v. Union Co.*, (Mich.) 157 N. W. 430.

Minerals Defined.

The cases defining what is a mineral, generally arising out of the construction of reservations in deeds, uniformly hold that the valuable metals and coal are within the meaning of the word, and the debatable substances have been the various forms of clays, stone, gravel, sand, oil, gas, and mineral waters.

The best definition of mineral seems to be: any form of earth, rock or metal of greater value while in place than the enclosing country or the superficial soil.

McCombs v. Stephenson, 44 So. 867, 154 Ala. 109, which adopted this definition, is a case in which the authorities are reviewed. *Hext v. Gill*, L. R. 7 Ch. App. 699, 17 M. R. 1, construing a reserve of china clay, is a learned English case on the subject; followed by *Johnstone v. Crompton*, L. R. 2 Ch. 197 (1899).

Meteorite—Fossils—Cave.

A meteorite is real estate.—*Oregon Iron Co. v. Hughes*, 47 Or. 313, 8 Ann. Cas. 556, 81 P. 572; *Goddard v. Winchell*, 86 Iowa 71, 32 N. W. 1124, 41 Am. St. Rep. 481, 17 L. R. A. 788. Fossils of dinosaurs do not create mineral value.—44 L. D. 325. Nor the presence of a cave of stalactites.—30 L. D. 357.

PLACERS.

Open to Location and Patent.

R. S. Sec. 2329.—Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.—*Sec. 12, July 9, 1870.*

Size of Claim—Legal Subdivisions.

R. S. Sec. 2330.—Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.—*Id.*

Twenty Acres to One Locator.

R. S. Sec. 2331.—Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims can

not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes. —*Sec. 10, May 10, 1872.*

Location and Certificate—Notice and Stakes.

R. S. Colo. Sec. 4205.—The discoverer of a placer claim shall, within thirty days from the date of discovery, record his claim in the office of the recorder of the county in which said claim is situated, by a location certificate, which shall contain:

First—The name of the claim, designating it as a placer claim;

Second—The name of the locator;

Third—The date of location;

Fourth—The number of acres or feet claimed; and,

Fifth—A description of the claim, by such reference to natural objects or permanent monuments as shall identify the claim.

Before filing such location certificate the discoverer shall locate his claim:

First—By posting upon such claim a plain sign or notice, containing the name of the claim, the name of the locator, the date of discovery, and the number of acres or feet claimed;

Second—By marking the surface boundaries with substantial posts, and sunk into the ground, to-wit: one at each angle of the claim. —*March 12, 1879.*

Legislation Concerning Placers.

Placer claims were not covered by the original A. C. of 1866.

The Act of 1870 brought them within Congressional recognition and made them open to patent.

They have been at all times regulated as to size, labor, mode of location, etc., by the district rules to a much greater extent than lode claims.

Placer Defined.

As commonly and properly understood, a placer claim means a location in which gold is found loose in sand or gravel and not in the vein or in place; it includes gulch claims, old channels, cement and drift diggings.

Mining Claims Divided Into Lodes and Placers.

But the U. S. Mining Acts make an arbitrary division of all minerals into two classes, to-wit: lodes and placers. All deposits of (metallic) minerals in place are called, when located, lode claims, and all deposits of other minerals in place or not in place are placers. An old channel gravel bed though having well defined enclosing rocks and a dip or pitch is a placer and not a lode.—*Gregory v. Pershbaker,* 15 M. R. 602, 73 Cal. 109, 14 P. 401.

Distinction Between Lode and Placer.

In *Webb v. American Asphaltum Co.,* 157 F. 203, 84 C. C. A. 651, a placer location had been made on a string-shaped injection of asphalt. Later, lode locations were made over it. The issue turned on whether it was lode or placer ground. The Court held that the issue was determined by the form of the deposit and the formation being fissure like and in place it was a lode, discarding entirely the non-metallic character of the mineral. In *U. S. v. Iron S. Co.,* 128 U. S. 679, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195, the Supreme Court had said: "By 'veins or lodes,' as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock." And in *St. Louis Co. v. Kemp,* 104 U. S. 649, 26 L. Ed. 875, occurs this clause: "A mining claim is a parcel of land containing precious metal in its soil or rock." But in neither of these last two cases was the point directly involved and the use of the word "metal" is therefore not of binding force. The *Asphaltum Co. case* is therefore thus far the authoritative decision on this important question, and we so print it with the qualification that it remains for the ultimate adjudication of the Federal Supreme Court before we can concede that it is a correct exposition of the law.

A phosphate bed in place with well defined walls is a lode, and a placer location can not be made upon it.—*Duffield v. S. F. Co.,* 205 F. 481, 123 C. C. A. 548.

When the ground was locatable as a lode claim only, a placer location is void and a later lode record will prevail against it.—*Id.*

Other Non-Metalliferous Deposits.

Discarding the rare cases instanced in the foregoing paragraphs where non-metallic but valuable mineral substances are found in fissure or lode-like formation, the uniform practice is to locate them as placers and the department has so ruled as to many specific minerals.

Citing and following the Asphaltum case, the Land Office held that a deposit of onyx in fissure form in place was a lode.—38 L. D. 504. Same ruling as to phosphate deposits.—41 L. D. 403.

Marble may be located upon as a placer claim.—35 L. D. 652.

Deposits of borax, soda, sulphur, alum and asphalt are valuable mineral deposits and as such patentable as placers.—25 L. D. 351.

Land containing stone suitable for making lime may be entered as a placer claim.—17 L. D. 82. Deposits of slate make placer ground.—40 L. D. 7. The same as to fireclay or kaolin.—1 L. D. 579, Rev. Ed. 565.

Otherwise as to clay suitable for portland cement.—40 L. D. 620.

A granite quarry may be entered as a placer.—3 L. D. 116; cited 42 L. D. 147.

The department held in *Clark v. Erwin* that a placer location made to cover building stone is not validated by the subsequent discovery of fireclay, patentable as placer, although the original record did not confine itself to any particular kind of placer deposit.—17 L. D. 550. The opinion does not give any substantial reason for this ruling.

Building sand is a valuable mineral and may be patented as a placer claim.—*Loney v. Scott*, 57 Or. 378, 32 L. R. A. (N. S.) 466, 112 P. 172.

Withdrawn Minerals.

Recent special legislation under the conservation theory of phosphate rock, nitrates, potash and asphalt is referred to under the "WITHDRAWAL ACTS."

Regulations for entry of phosphate, nitrate, potash, oil, gas or asphalt under Act of July 17, 1914, 38 Stat. L. 509, are found in 44 L. D. 32.

Placer locations on phosphate lands under Act of January 11, 1915. The Act validates such locations prior to withdrawal.—44 L. D. 46.

Oil Lands.

See p. 665.

Salines Were the Subject of Congressional Legislation

for many years prior to the Mining Acts of 1866-72. Under those Acts they were still treated as neither lode nor placer but open to entry under special statutes until 1901, when they were declared to be placer ground. See ACT, p. 648.

Quarries—Building Stone.

Land "chiefly valuable for building stone" may be located and patented as a placer claim. A. C. Aug. 4, 1892 (page 653). If such stone is found on unsurveyed land this is the only procedure to secure title. Under the department rulings any stone of special commercial value is held to be placer ground.—15 L. D. 370, 16 *Id.* 508.

Stone land can not be located or patented as a lode claim.—23 L. D. 353, 395; *Wheeler v. Smith,* 5 Wash. 704, 32 P. 784.

Stone—Timber.

But under the Timber and Stone Acts of 1878 and 1892 if on a surveyed section land is found which is "valuable chiefly for stone" it may be filed upon and title obtained by procedure

much more expeditious and simpler than by locating it as a placer and with no necessity of annual labor or $500 expenditure.

The other principal prerequisites are that the land does not contain "valuable deposits of gold, silver, cinnabar, copper or coal," that it is "unfit for cultivation," "uninhabited" and contains no hostile improvements.

The applicant makes no local staking or record but applies to the Land Office direct, to purchase, by filing sworn statement that the land and the applicant come within the terms of the Act. The procedure is the same as that provided for the entry of land chiefly valuable for timber. The Act and a statement of the regulations are printed on pages 658-663.

Location Without Specific Mineral Value.

Some of the decisions of the department aided by the Act of 1892 allowing quarries to be entered were sufficiently loose to allow a claim to be laid upon any ground; for either what can be called building stone, or a color of gold in the pan, can be found practically anywhere—but the obviously needed declaration was at length made that land could not be taken up as placer ground on mere wash or because a color could be panned, its real value being on account of its proximity to lode claims. It must contain mineral in paying quantities. —*Royal K. Placer,* 13 L. D. 86. Nor where it had no characteristic of any form of placer.—*Searle Placer,* 11 L. D. 441. A trace of gold is not enough.—*Multnomah Co. v. U. S.,* 211 F. 100, 128 C. C. A. 28.

Discovery or Knowledge of Mineral Value on Placer Claim.

Unless specifically required by State statute or district rule, no discovery shaft is required, but the Act of Congress implies that mineral shall have been found before the right to locate upon the same as a placer claim accrues.—13 L. D. 86.

A discovery pit or shaft on a vein shows to the eye a mineral formation specifically distinct from the surrounding country.

A pit or shaft on placer gravel shows nothing of that sort. A pit or shaft on any of the various minerals claimed as statutory placers might or might not show such indication. Such working is not essential to the disclosure of mineral value on this class of claims. But it is clear from the implied requirement of knowledge or discovery of mineral character, that the ground about to be located must have a special value as either placer proper or for some special deposit treated as placer ground under the statute, and that merely surveying and recording vacant land as and for placer ground without known value under either class is a void proceeding when properly contested or attacked.

Discovery is as essential on a placer as it is on a lode claim.—*Steele v. Tanana Mines,* 148 F. 678, 78 C. C. A. 412. The same as to an oil placer.—*Smith v. Union Co.,* 166 Cal. 217, 135 P. 966; *U. S. v. Midway Oil Co.,* 232 F. 620.

Panning colors on surface of deep gravel drift, known to be gold bearing by work to bed rock in the near locality, makes a good discovery.—*Lange v. Robinson,* 148 F. 799, 79 C. C. A. 1. There must be "such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining."—*Charlton v. Kelly,* 156 F. 436, 13 Ann. Cas. 518, 84 C. C. A. 295; *Murray v. White,* 42 Mont. 423, Ann. Cas. 1912A, 1297, 113 P. 754. And it must be within the lines of the claim.—*Waskey v. Hammer,* 170 F. 31, 95 C. C. A. 305.

Discovery need not precede the location and record.—*Whiting v. Straup,* 95 P. 849, 17 Wyo. 1.

An association located a 160-acre placer and before discovery conveyed a specific part to a corporation who sank a well and made a valid discovery which the Court held to validate the entire claim.—*Merced Co. v. Patterson,* 162 Cal. 358, 122 P. 950.

In proving a discovery on a placer claim the locator is allowed to supplement the proof of discovery of colors by expert testimony as to the condition of neighboring claims and that such colors would justify an ordinarily prudent man

in further developing the property.—*Cascaden v. Bortolis*, 162 F. 267, 15 Ann. Cas. 625, 89 C. C. A. 247.

Digging ore from the neighborhood of old and well known workings is not such a discovery as entitled the miner to claim the State license.—*St. Anthony Co. v. Shaffra*, 120 N. W. 238, 138 Wis. 507.

In *Garibaldi v. Grillo* the little prospecting testified to was held no sufficient discovery; but the Court went further and held the very debatable proposition that the parties could not by stipulation waive proof of discovery.—17 Cal. App. 540, 120 P. 425.

Discovery Pit—Overlaps—Priority.

Plaintiffs staked a placer claim and made a discovery within its bounds. Afterwards they extended their lines so as to overlap an adjoining claim which had as yet no discovery but its owners were in possession. Plaintiffs made no discovery on the overlap. *Held*, that their original discovery applied only to their original stakes and that they had no title to the overlap.—*Biglow v. Conradt*, 159 F. 868, 87 C. C. A. 48.

It may be reasoned from this decision that while the first discoverer in taking up the area allowed by law might include ground upon which another prospector was only seeking to make a discovery, yet he can not do so where he had already set certain stakes and applied his discovery to the ground within those stakes.

A placer locator in making new lines to exclude excess ground left out his discovery pit, but it was held that if he made a new discovery elsewhere within his lines before the entry of a second party his claim would be valid in that respect.—*Waskey v. Hammer*, 170 F. 31, 95 C. C. A. 305; affirmed, 223 U. S. 85, 56 L. Ed. 359, 32 Sup. Ct. Rep. 187.

Where two sets of placer prospectors staked out overlapping claims and both began sinking for mineral, the first to discover gold held the ground without regard to priority of staking.—*Hanson v. Craig*, 170 F. 62, 95 C. C. A. 338; *Johan-*

son v. White, 160 F. 901, 88 C. C. A. 83; *Hall v. McKinnon,* 193 F. 572, 113 C. C. A. 440.

A Separate Discovery on Each Twenty Acres Is Not required where there has been a joint location of 160 acres.—*McDonald v. Montana Co.,* 14 Mont. 88, 43 Am. St. Rep. 616, 35 P. 668; *Whiting v. Straup,* 17 Wyo. 54, 95 P. 849; *Kirk v. Meldrum,* 21 M. R. 393, 28 Colo. 453, 65 P. 633; *Union Oil Co.,* 25 L. D. 351, overruling previous Land Office holding to the contrary.—L. O. Reg. 19.

Dummies—Nominal Association.

It requires eight *bona fide* locators to lawfully claim 160 acres. The names of nominal parties are often used to locate placer ground, and such nominal association is not questioned in land office proceedings, but its validity may well be doubted when contested in court. Such use of names with agreement to reconvey without consideration has been held void as against public policy.—*Mitchell v. Cline,* 84 Cal. 409, 24 P. 164; *Durant v. Corbin,* 94 F. 382, 20 M. R. 84.

In *Gird v. California Oil Co.,* 60 F. 532, 18 M. R. 45, the Court held to a very strict construction on this point, and ruled that where three persons in the employ of a corporation located sixty acres it was good only to the extent of a single location of twenty acres.

The defendant can not show in an action where the government is not a party either actually or constructively, that the claim was located by dummies for plaintiff's benefit.—*Riverside Co. v. Hardwick,* 16 N. M. 479, 120 P. 325.

In *Hall v. McKinnon,* 193 F. 572, 113 C. C. A. 440, it was held that proof that locator was a dummy would not be allowed when there was no such allegation in the pleadings.

In *Nome Co. v. Snyder,* 187 F. 385, 109 C. C. A. 217, it was held that: A location by five persons of 100 acres under an arrangement by which a stock company was to be formed and

issue to some of the parties less than one-fifth and to others more than one-fifth was invalid as to the whole, the effect being to give to each of the latter class a location of more than the legal limit of twenty acres. By this line of argument a location regular on its face was defeated. In 44 L. D. 340, where the associates incorporated and took stock, the transaction was held valid.

After location is complete the association may make agreement by which one of them may own more than twenty acres. —*Rooney v. Barnette,* 200 F. 700, 119 C. C. A. 116.

A placer location of 160 acres by eight persons invalid for want of discovery can not be perfected by the locator's single grantee upon subsequent discovery.—38 L. D. 59.

A placer location of 160 acres subsequently transferred to one person, invalid for want of discovery, can be perfected by the transferee only as to twenty acres.—39 L. D. 460.

The department may question the extent of mineral land covered by a placer and non-mineral bearing tracts may be cut out.—39 L. D. 299.

Attempting Excess by Amendment.

Where the maximum quantity has been taken by a certain number of persons, the size can not be enlarged by an amended location.—38 L. D. 28. The owner of two contiguous locations can not merge them into one by amended location.—*Id.*

Size of Claim That May Be Located Is Limited to 20 Acres

to each individual or person. A corporation is one person without reference to the number of its incorporators.—38 L. D. 281. It can not, by the use of its stockholders' names, locate more than a single twenty-acre claim.—40 L. D. 401. An association of persons may locate a claim in common not exceeding twenty acres to each individual in the association, and not exceeding 160 acres to the entire association. A location by an association of 160 acres is but a single claim.—

Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 P. 1083, 74 P. 444.

There is no limitation on the number of placer claims which one person may locate (except in Alaska).—*Riverside Co. v. Hardwick,* 16 N. M. 479, 120 P. 323.

Excess Acreage.

Where a miner has located a claim in excess of the twenty-acre limit, he has still the right to his twenty acres, and to a reasonable time to select it.—*Zimmerman v. Funchion,* 161 F. 859, 89 C. C. A. 53. In default of such a selection the excess may be taken up by a stranger.—*Gohres v. Illinois Co.,* 40 Or. 516, 67 P. 666.

When unauthorized names have been used to take up a placer claim this does not prevent the parties not connected with the fraud from segregating and retaining each his twenty acres out of the larger tract.—*Cook v. Klonos,* 168 F. 700, 94 C. C. A. 144; *Waskey v. Hammer,* 170 F. 31, 95 C. C. A. 305.

The Navajoe placer survey was found to contain a little over two and one-half acres in excess of the legal limit of twenty acres. When this was discovered the Papoose fraction placer was located to overlap the Navajoe to the extent of the excess. Two judges of the Court held that the later location was wholly void; that the Navajoe had a reasonable time to disclaim on the excess, and it was not for strangers to say where the excess was to be cut out. GILBERT, J., dissented in a very strong opinion.—*Jones v. Wild Goose Co.,* 177 F. 95, 29 L. R. A. (N. S.) 392, 101 C. C. A. 349.

Conformation to U. S. Sectional Subdivisions.

The Act speaks of making survey for the placer claim conform as nearly as possible with the rectangular subdivisions of the public lands, but under the early practice in the Land Office it was utterly disregarded—so much so as to allow patents to issue in fantastic shape obviously intended to secure the bed of streams or other irregular advantages.

But later, strict compliance was required, the entry being confined to contiguous blocks of not less than ten acres each, and a rectangular piece of ground when on unsurveyed land. —30 L. D. 225, 32 *Id.* 198, 363, 401; 34 *Id.* 42, 44, 56, 260; 35 *Id.* 557. By a later decision some of the previous holdings were overruled and modified and the ruling now is that where strict conformity is impracticable, it will be sufficient if the ground located by one or two persons can be entirely included within a square forty-acre tract; by three or four persons, within two forty-acre tracts placed end to end; by five or six persons, within three, and by seven or eight persons, within four such tracts. The forty-acre tracts need not have cardinal lines.—37 L. D. 250. See L. O. Reg. 30, p. 492.

Where the mineral ground is confined within a narrow canyon the location need not conform to the subdivisions.—*Mitchell v. Hutchinson,* 142 Cal. 404, 76 P. 55. The department has made a like ruling in cases involving "gulch" claims. —32 L. D. 363, 401.

Procedure to Complete Location.

Presuming that free gold or some other valuable deposit other than a lode in place is known to exist, in other words, that a discovery in some form has been made on the ground, the claimant must post upon the claim the statutory notice (p. 258) which may be in form as follows:

LOCATION NOTICE.

Nellie Moore Placer Claim.

The undersigned claims *20 acres* for placer mining purposes, as staked on this ground. Date of discovery, January 10, 1916.

GEORGE A. MCDONALD.

SECOND FORM.

Ballarat Placer Claim.

The undersigned claims *1320 feet* in length along the gulch by *660 feet* in breadth, for placer mining purposes, as staked on this ground. Discovered January 10, 1916. T. S. WALTEMEYER.

Dates.

It will be noted that the notice on the stake in Colorado must contain the date of *discovery* while the record must contain the date of *location*. The date when the posting and staking are completed would be such date of location.

Place of Posting.

Where not directed by statute or district rule, such notice should be posted at the center point of the claim, or at some point where the prospecting pits show actual work. It should be conspicuous and either close to the apparent discovery or at the center as above suggested.

Stakes and Ties.

The locator then stakes his claim, placing a "substantial post," "sunk in the ground" at each angle of the claim. No center stakes are required. Accuracy and strictness in fixing and marking the boundaries can not be too severely urged. Of course the discovery pit or some of the angles should be tied to "natural objects" or "permanent monuments" in order to make a proper location certificate or record. We advise the same as in case of lode claim (see page 57). A failure to stake invalidates the claim.—*Anthony v. Jillson*, 16 M. R. 26, 83 Cal. 296, 23 P. 419.

Location by Trespass.

The rule that a location can not be initiated by trespass upon a prior valid possession applied in contest where both claims were placers.—*Kirk v. Meldrum*, 28 Colo. 453, 65 P. 633, 21 M. R. 393; *Little Co. v. Bacigalupi*, 167 Cal. 381, 139 P. 802.

Staking Government Subdivisions.

Whether staking is required where the claim is taken up by governmental subdivisions has been the subject of curious judicial rulings. It was held that the locator must stake out

his claim the same as if he were locating on a private survey, in *White v. Lee,* 78 Cal. 593, 21 P. 363, 17 M. R. 206. This decision was followed by a case in Arkansas, *Worthen v. Sidway,* 72 Ark. 215, 79 S. W. 777, and just about the same time *White v. Lee* was overruled in *Kern Co. v. Crawford,* 143 Cal. 298, 3 L. R. A. (N. S.) 993, 76 P. 1111.

Colorado holds positively that every placer claim must be staked.—*Saxton v. Perry,* 47 Colo. 263, 107 P. 281.

It would seem that the question could arise only where a full quarter section is taken up as one claim, for the government does not stake any smaller subdivisions, while it allows subdivisions as small as ten acres to be taken up. It does not follow that the original survey stakes are on the ground when the location is made, nor if they were would they afford the slightest notice that the quarter section had been located as a mining claim. In view of the contrary status of the rulings the only safe procedure is to stake *de novo.*

And yet the Land Office has ruled that no staking is required where any subdivision is taken.—22 L. D. 409. Where the statute of any State requires staking as an item of the location the point should be clear to the contrary.

Where a placer claim is located by a legal subdivision it need not except or refer to fractions already patented. The record should claim the subdivision, leaving it to the Land Office to make the proper exclusions—changing the old ruling on this point.—*Green v. Gavin,* 10 Cal. App. 330, 101 P. 931, citing 43 L. D. 44 and 31 L. D. 64.

Non-Contiguous Fractions.

Six or eight placer claims, contiguous, overlapping and irregular in shape, covered about a quarter section of ground, leaving several small non-contiguous fractions of vacant ground between them. Plaintiffs surveyed an association claim over almost the whole area occupied by the prior, smaller claims, and contended that this gave them title to the fractions; but the Court, construing the language of Sec. 2330,

above printed, held that their blanket location was void.—*Stenfield v. Espe*, 171 F. 825, 96 C. C. A. 497.

Record.

The notice being erected and the ground surveyed and staked, the location is complete and ready for record, the location certificate being in form as follows:

PLACER LOCATION CERTIFICATE.

KNOW ALL MEN BY THESE PRESENTS, That I, *George A. McDonald*, of the City and County of *Denver*, State of Colorado, claim, by right of discovery and location, the *Nellie Moore* placer claim, containing *twenty* acres (or 1320 feet in length by 660 feet in width), situate in *Cripple Creek* Mining District, County of *Teller*, State of *Colorado*, bounded and described as follows, to-wit: Beginning at stake at corner No. 1: *(here insert description, giving a course to each line, and tying one or more corners to a government corner, well known natural object or permanent monument, etc.)*. Date of discovery, *January 10, 1915*. Date of location, *January 27, 1915*. Date of certificate, *January 29, 1915*.

GEORGE A. MCDONALD.

Description by claiming so many feet along the creek and so many feet on each side of the creek, treating the creek as an identifying monument, was sustained in *McKinley Co. v. Alaska Co.*, 183 U. S. 563, 46 L. Ed. 331, 22 Sup. Ct. Rep. 84, 21 M. R. 730.

An amended location certificate may be filed the same as allowed for lode claims.—*Kirk v. Meldrum*, 28 Colo. 453, 65 P. 634, 21 M. R. 393.

In *Strickland v. Commercial Co.* the record of a placer claim (in a State which has no statutory requirements as to such record) was held void for indefiniteness.—55 Or. 48, 104 P. 965.

Federal Requirements.

The federal requirements of R. S. Sec. 2324 as to marking boundaries, names of locators, date of location and description by tie, recited in detail on p. 68, are mandatory and apply to placers as well as to lode claims.—*Ware v. White*, 81 Ark. 220, 108 S. W. 831.

The Statutory Requirements

of Alaska and those mining States which detail the location of placer claims are as follows:

Alaska.

LOCATION NOTICE.

Any person qualified under the laws of the United States, who discovers upon the public domain within the Territory of Alaska, a placer deposit of gold, or other mineral which is subject to entry and patent under the mining laws of the United States, may locate a mining claim thereon in the following manner, to-wit:

First—He shall post, or write upon the initial post, stake, or monument on the claim, a notice of location containing:

a. The name or number of the claim.

b. The name of the locator or locators.

c. The date of discovery and of posting notice on the claim.

d. The number of feet in length and width of the claim.

This notice shall be known as the location notice.

STAKING.

Second—He shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes, or posts, not less than three feet high above the ground and three inches in diameter, hewed on four sides; or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high and three feet in diameter and the stakes, posts or monuments so used must be marked with the name or number of the claim and the designation, by number, of the corner or angle. The initial stake or monument shall be one of the corner stakes, posts or monuments of the claim located.

BLAZING LINE STAKES.

If the claim is located on ground that is covered wholly or in part with brush or trees, such brush or trees shall be cut or blazed along the lines of such claim, so as to be readily traced.

If located in an open country, the boundary lines shall be located by placing line stakes or line monuments so as to be readily traced from corner to corner of said claim.—*Sec. 1, Act of April 20, 1915.*

LOCATION CERTIFICATE. RECORD.

Sec. 2.—Within ninety days after the discovery and posting of the notice aforesaid, the locator shall record with the Recorder of the District wherein such claim is situated, a certificate of location. Such certificate shall contain:

a. The name or number of the claim.

b. The name of the locator or locators.

c. The date of discovery and of posting of the location notice.

d. The number of feet in length and width of claim.

e. It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments.

A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to relocation; *Provided*, That if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator.—*Sec. 2 Id.*

LIMITATIONS OF LENGTH AND WIDTH.

That no individual placer mining location hereafter made shall be more than thirteen hundred twenty feet in its greatest length; and no association placer mining claim hereafter located shall be more than two thousand six hundred forty feet in its greatest length.—*Sec. 5 Id.*

The A. C. of August 1, 1912, 37 Stat. L. 242, reads as follows:

That no association placer mining claim shall hereafter be located in Alaska in excess of forty acres. * * * —*Sec. 1.*

Sec. 2 of the A. C., the agency placer location section, is printed on page 635 as Sec. 129B of the Territorial Act.

That no person shall hereafter locate, cause or procure to be located, for himself more than two placer mining claims in any calendar month; *Provided*, That one or both of such locations may be included in an association claim.—*Sec. 3.*

That no placer mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.—*Sec. 4.*

As Sec. 1 of the A. C. above printed limits the area of an association claim, and the Territorial Act (p. 636) limits the length and width, a confusion is produced which requires close attention to conform to the limited area and the proportions between length and width.

Only 40 acres can be located as an association claim. The length

can not exceed 2,640 feet and the length must not exceed three times the width.

A claim 1,320 by 1,320 feet makes the full 40 acre limit. A claim 2,640 feet in length by 880 feet in width keeps it within the provision that the length must not exceed three times the width, but such a claim would make an association location in excess of 53 acres, which, of course, is forbidden.

2,640 feet by 660 feet makes the 40 acres but violates the clause as to three times the width.

1,980 feet by 880 feet makes 40 acres and this figure, 1,980, seems to be the greatest length in even feet that can be surveyed to get exactly 40 acres and at the same time keep within the provision that the length must not exceed three times the width.

2,286 feet length by 762 feet, one-third of its width, makes a location of 39.981 acres.

Arizona.

1. Post notice containing name of the claim, name of locator, date of location and number of acres claimed, and description, with reference to natural object or permanent monument.

2. Mark boundaries with post or monument of stones at each angle of claim. Posts must be four inches (square) by four and a half feet long set one foot in the ground and surrounded by a mound of stone or earth. "When a mound of stone is used it must be at least three feet in height and four feet in diameter at the base."

3. Within sixty days after date of location, record with County Recorder a copy of the location notice.

California.

1. Post upon a tree, rock in place, stone, post or monument a notice of location, containing the name of the claim, name of locator or locators, date of location, number of feet or acreage claimed, such a description of the claim by reference to some natural object or permanent monument as will identify the claim located, and by marking the boundaries so that they may be readily traced; *Provided*, That where the United States survey has been extended over the land embraced in the location, the claim may be taken by legal subdivisions and no other references than those of said survey shall be required and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivisions shall be deemed the equivalent of marking.

2. Within thirty days after posting record a true copy of the notice in the office of the County Recorder.

Idaho.

1. Placer claims, as mentioned in section 2329 of the Revised Statutes of the United States, may be located for the purpose of mining deposits and precious stones after the discovery of such deposits.—*Rev. Code, Sec. 3221.*

DETAILS OF LOCATION.

2. The locator of any placer mining claim located for the purpose of mining placer deposits or precious stones must, at the time of making the location, place a substantial post or monument as is required in the location of quartz claims at each corner of the location, and must also post on one of the same a notice of location containing the date of the location, the name of the locator, the name and dimensions of the claim, the mining district (if any) and county in which the same is situated; and must also give the distance and direction from said post or monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim.

Within fifteen days after making the location, the locator must make an excavation upon the claim of not less than one hundred cubic feet, for the purpose of prospecting the same.

Within thirty days after the location, the locator must file for record in the office of the Recorder of the county, or of the Deputy Recorder of the mining district in which the claim is situated, a substantial copy of his notice of location, to which must be attached an affidavit such as is required in case of quartz claims.—*Rev. Code, Sec. 3222.*

Montana.

1. Post notice at point of discovery, containing name of the claim, name of locator, date of location and number of acres or superficial feet claimed.

2. Within sixty days from date of posting sink shaft ten feet vertically disclosing the deposit or its equivalent, same as lode claims, page 74.

3. Within thirty days from date of posting, mark boundaries in same manner as required in case of lode claims.

4. Within sixty days after posting notice record in the office of the County Clerk a certificate of location containing same as in case of lode claims, page 74, but instead of length and width state: "The dimensions or area of the claim and the location thereon on the discovery shaft, cut or tunnel."

The last words of the above quotation beginning with "and the location" are not intelligible, but possibly it was intended that the record should indicate the position of the discovery pit.

This certificate must be verified as per form on page 75.

Nevada.

1. Post upon a tree, rock in place, stone, post or monument, a notice of location containing the name of the claim, name of locator, date of location, and number of feet or acres claimed.

2. Mark surface boundaries and the location point in the same manner and by same means required for lode claims; on surveyed land when taken by legal subdivision, only the location point need be marked. (Page 75.)

3. Within ninety days after posting the notice of location, perform not less than $20 worth of labor upon the claim for the development thereof and record with District and County Recorder a certificate which shall state the name of the claim, designating it as a placer claim; name of the locator; date of location; number of feet or acres claimed and description of the claim with regard to some natural object or permanent monument so as to identify the claim and the kind and amount of location work done and the place on the claim where said work was done.

New Mexico.

(Act of 1909)

The locator at the time of making any location of any placer mining claim shall cause a notice of such location to be placed at a designated corner of the claim stating the name of the claim, the purpose and the kind of material for which such claim is located, and the name of the locator. If on surveyed lands such notice shall contain a description by its legal subdivisions; on unsurveyed lands a description by metes and bounds with reference to some known object or monument.

Each corner, whether on surveyed or unsurveyed lands, shall be marked by a wooden post at least four feet high, securely set in the ground or by a substantial stone monument.

A duplicate of such location notice shall be filed and recorded in the office of the Probate Clerk within ninety days after notice posted.

There must be a previous discovery: except that oil and gas claimants shall have to the end of the calendar year to make discovery and their possession in the meantime is to be protected.

Utah.

The statutory provisions as to location and record of lode claims (page 81) apply also to placer claims, the notice and record in cases of placers giving the number of acres or superficial feet claimed.—*Comp. Laws 1907, Sec. 1496.*

Washington.

LOCATION NOTICE. STAKING.

The discoverer of placers or other forms of deposits subject to location and appropriation under mining laws applicable to placers shall locate his claim in the following manner:

First—He must immediately post in a conspicuous place at the point of discovery thereon, a notice or certificate of location thereof, containing (a) the name of the claim; (b) the name of the locator or locators; (c) the date of discovery and posting of the notice hereinbefore provided for, which shall be considered as the date of the location; (d) a description of the claim by reference to legal subdivisions of sections, if the location is made in conformity with the public surveys; otherwise, a description with reference to some natural object or permanent monuments as will identify the claim; and where such claim is located by legal subdivisions of the public surveys, such location shall, notwithstanding that fact, be marked by the locator upon the ground the same as other locations.

RECORD. MONUMENTS.

Second—Within thirty days from the date of such discovery he must record such notice or certificate of location in the office of the auditor of the county in which such discovery is made, and so distinctly mark his location on the ground that its boundaries may be readily traced.

DISCOVERY WORK. OIL AND GAS EXCEPTED.

Third—Within sixty days from the date of discovery the discoverer shall perform labor upon such location or claim in developing the same to an amount which shall be equivalent in the aggregate to at least ten dollars' worth of such labor for each twenty acres or fractional part thereof contained in such location or claim; *Provided, however,* that nothing in this subdivision shall be held to apply to lands located under the laws of the United States as placer claims for the purpose of the development of petroleum and natural gas and other natural oil products.

AFFIDAVIT OF PERFORMANCE.

Fourth—Such locator shall upon the performance of such labor, file with the Auditor of the county an affidavit showing such performance and generally the nature and kind of work so done. *R. & B. Code, Sec. 7367.*

Wyoming.

LOCATION CERTIFICATE.

Hereafter the discoverer of any placer claim shall, within ninety days after the date of discovery, cause such claim to be recorded in the office of the County Clerk and *ex-officio* Register of Deeds of the county within which such claim may exist, by filing therein a location certificate, which shall contain the following:

First—The name of the claim, designating it as a placer claim.

Second—The name or names of the locator or locators thereof.

Third—The date of location.

Fourth—The number of feet or acres thus claimed.

Fifth—A description of the claim by such designation of natural or fixed objects as shall identify the claim beyond question.

LOCATION NOTICE AND STAKING.

Before filing such location certificate, the discoverer shall locate his claim: *First*—By securely fixing upon such claim a notice in plain, painted, printed, or written letters containing the name of the claim, the name of the locator or locators, the date of the discovery, and the number of feet or acres claimed. *Second*—By designating the surface boundaries by substantial posts or stone monuments at each corner of the claim. —*Comp. St., Sec. 3474.*

North and South Dakota, and Oregon Have No Specific statutory provisions for the manner of locating and recording placer claims, and in those States such locations are governed by district rules, where such rules exist, and by the terms of A. C. Sec. 2324. See page 68.

A placer location made according to the forms given for Colorado would doubtless be sufficient in any State where neither local statute nor district rules require more specific details.

A full set of instructions as to what makes a valid placer location in a Territory having at that time no specific statute on the subject is found in *Walton v. Wild Goose Co.*, 123 F. 209, 60 C. C. A. 155, 22 M. R. 688.

No Reservation Against Patentee.

When patented under a location of the ground as a "placer mining or stone quarry claim" the patentee owns all minerals found within its bounds except known lodes.—*Freezer v. Sweeney,* 8 Mont. 508, 21 P. 20, 17 M. R. 179. And doubtless he owns to the same extent under a location before patent subject to the right to locate lode discoveries over the same ground, and except lodes apexing outside but dipping underneath.

Homestead.

Lands located and used as a placer and also used as a residence by the owner, may be selected by him as a homestead, under the State law of exemptions, the question of title in the United States being excluded.—*Gaylord v. Place,* 98 Cal. 472, 33 P. 484.

Nelson v. Brownell, 193 F. 641, 113 C. C. A. 509, declares the procedure in contest between homesteader and mineral claimant in Alaska.

Area in Feet or Acres.

By the following table the number of feet necessary to include any desired number of acres when in the shape of a square or parallelogram may be ascertained:

Claim	660	x	330	feet	contains	5	acres.
"	500	x	500	"	"	5.73	"
"	660	x	660	"	"	10	"
"	1320	x	660	"	"	20	"
"	800	x	1089	"	"	20	"
"	933⅓	x	933⅓	"	"	20	"
"	1320	x	1320	"	"	40	"
"	2640	x	2640	"	"	160	"

43,560 square feet equal one acre. A square 208.71 feet in length and width makes one acre.

PLACER CONTAINING LODE.

Claim Intersected by Lode.

R. S. Sec. 2333.—Where the same person, association or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.—*Sec. 11, May 10, 1872.*

Known Lodes Excluded.

An application for patent to a placer claim is not supposed to include any known lode running through it, unless such lode is owned by the applicant and especially designated in the application, but the patent when issued covers any after discovered lode.—*O'Keefe v. Cannon,* 52 F. 898.

The placer patentee acquires no title to lodes known to exist prior to and not included in his application.—*Clary v. Hazlitt,* 67 Cal. 286, 7 P. 701.

The exception of known lodes does not apply to placer patents issued on entries prior to May 10, 1872.—*Cranes G. Co. v. Scherrer,* 134 Cal. 350, 86 Am. St. Rep. 279, 66 P. 487, 21 M. R. 549.

What is a known lode is a question for the jury. If such a lode exists it is locatable over the patented ground.—*Noyes v. Clifford,* 94 P. 842, 37 Mont. 138.

Kift v. Mason, 42 Mont. 232, 112 P. 392, seems to hold that the burden of proof of prior discovery of the alleged known lode is on the lode claimant and such is undoubtedly the rule on general principles.

No statute of limitations runs against the assertion of a known lode. A decision that the claimant has not proved a known lode is not *res adjudicata* as to any other claimant.—*Barnard Co. v. Nolan,* 215 F. 996.

What Are Known Lodes.

Where a lode within the placer lines has been discovered, located and recorded, and has kept up its labor to the time of the placer application, it is clear that such is a "known lode" beyond any possible danger of construction.

But lodes which, though known, have not been considered worth locating, or after location have been abandoned, or where they have been known as a matter of common knowledge to be within the lines, as in the case of outcrops not considered worth working, are not such known lodes as are excluded from a placer patent.—*McConaghy v. Doyle,* 32 Colo. 92, 75 P. 419; *Barnard Co. v. Nolan,* 215 F. 996.

A placer application was adversed by two lodes, but won the adverse suits, and its patent issued. *Held,* that this was no adjudication of the non-existence of a known lode even within the area in conflict with the adversing lodes as against parties not claiming under the defeated lodes.—*Butte Co. v. Merriman,* 32 Mont. 402, 108 Am. St. Rep. 590, 80 P. 675.

Known But Not of Known Value.

It has been held with much reason that a lode or vein though known to exist but having no such value as would justify its exploration or working, or by like expression to the same effect—is not within the exception of the patent.—*O'Keefe v. Cannon,* 52 F. 898; *Brownfield v. Bier,* 15 Mont. 403, 39 P. 461; *Butte Co. v. Sloan,* 16 Mont. 97, 40 P. 217. It must be a lode of known practical value for working.—*Mon-*

tana Cent. R. Co. v. Migeon, 68 F. 811; *Migeon v. Montana C. R. Co.*, 77 F. 249, 23 C. C. A. 156, 18 M. R. 446; *Casey v. Thieviege*, 19 Mont. 341, 61 Am. St. Rep. 511, 18 M. R. 624, 48 P. 394. But it need not show pay ore in sight.—*Mason v. Washington Co.*, 214 F. 32, 33, 130 C. C. A. 426.

The allegation in an answer that there were no known deposits of sufficient value to pay—is a proper plea of no known lodes and does not state a conclusion of law.—*O'Keefe v. Cannon*, 52 F. 898.

Known But Not Recorded.

It was held in *Noyes v. Mantle*, 127 U. S. 348, 32 L. Ed. 168, 8 Sup. Ct. Rep. 1132, 15 M. R. 611, that a located claim was a known lode. But in *Iron Silver Co. v. Mike & Starr Co.*, 143 U. S. 394, 430, 36 L. Ed. 201, 12 Sup. Ct. Rep. 543, 17 M. R. 436, the Supreme Court go further and hold that it is sufficient to exclude it that it be a lode known to exist, and that where a lode had been notoriously cut in a tunnel within the claim, it was such a disclosure of the vein as to bind the patentee to a knowledge of it. And while holding (p. 404) that not every outcrop or crevice suggesting mineral would constitute a known lode within the class to be excepted, yet any vein disclosed and understood to be of value was excluded, and whether a vein was known and was of such character as to be excluded was a question of fact for *nisi prius* decision by jury.

The mere fact that a lode record has been made over the ground now claimed as placer does not prove that there was a vein on which to record.—23 L. D. 476; *Butte Co. v. Sloan*, 16 Mont. 97, 40 P. 217. And when the issue of lode or no lode has been left on conflicting evidence to the jury the Court will not set their finding aside.—*Id.*

A lode known to exist before, may be located after, the patent issues; and it is known to exist when the patentee knew of it, when it was matter of general knowledge or when an examination of the ground should have disclosed it, but

lodes so low in assay as not to be workable are not excepted whether known or not.—*Mutchmor v. McCarty*, 149 Cal. 603, 87 P. 85.

To Whom Known.

In the *Mike & Starr case* it was held that it must be known to the applicant or to the community in general. If obvious to casual inspection, knowledge was chargeable to the owner. But a lode discovered, located and of record before the patent application, is a known lode whether or not the patentee had knowledge of it.—*Noyes v. Mantle*, 127 U. S. 348, 32 L. Ed. 168, 8 Sup. Ct. Rep. 1132, 15 M. R. 611.

In the case of *Reynolds v. Iron Silver Co.*, 116 U. S. 687, 29 L. Ed. 774, 6 Sup. Ct. Rep. 601, 15 M. R. 591, the Court ruled that the lode in or underlying the Wells & Moyer placer being shown to be known to the applicants, could not be recovered by them in ejectment as against adjoining lode owners who had worked beyond their side lines into the deposit.

Date of Discovery Material.

It had been held that the lode (to be an excepted known lode) must be discovered before entry but the date of application is now the conceded date.—*Dahl v. Raunheim*, 132 U. S. 260, 33 L. Ed. 324, 10 Sup. Ct. Rep. 74, 16 M. R. 214; *Mike & Starr case, supra.*

The application referred to is the application upon which the patent ultimately issues and the date of application is the date of filing the paper "M" (post p. 560) in the course of proceedings to obtain patent.

A lode patent issued over prior patented placer ground is no evidence of priority.—*Clark Co. v. Ferguson*, 218 F. 959.

Necessity of Adverse or Protest—Patenting Lode Over Placer.

If a known lode, whether held by strangers, or not located at all, though known to exist, is under the express terms of the statute as recognized by many decisions excepted from the

grant—it would seem a necessary deduction that it need not file any adverse claim to preserve its rights. But if it be neglected either to procure an exclusion from the placer survey or to adverse and the placer patent issues, the Land Office will not as of course entertain an application to patent the lode. Before the application will be received it requires a hearing in the local Land Office after notice to the placer patentee as to whether in fact the lode was known to exist, and unless upon such hearing the fact is affirmatively so found, it denies the application.—*South Star lode,* 20 L. D. 204; 27 *Id.* 676.

If the finding is that the lode was known, the placer patentee is still at liberty to contest the lode application by showing and securing a judicial determination upon verdict that the lode was not known to exist.—*Alice M. Co. v. Street,* U. S. Circuit Court, Denver, unreported.

Where the placer had been adversed by a lode claim, the placer winning, it is *res adjudicata* that such lode was not excluded from the placer patent.—*Mason v. Washington Co.,* 214 F. 32, 33, 130 C. C. A. 426.

The practice of the Land Office has not been uniform upon this point, and for some years prior to the *South Star case* it had refused all applications to enter lode claims over placers except by consent of the placer patentee on the ground that the *ex parte* proof of no known lodes originally made by the applicant definitely established the non-existence of known lodes. And yet, in instances a patent to both lode and placer had been granted, as in *Iron S. Co. v. Campbell,* 135 U. S. 286, 34 L. Ed. 155, 10 Sup. Ct. Rep. 765, 16 M. R. 218. In that case each party having his proof of legal title in the shape of a patent, the question of priority was held to be an extrinsic fact to be found and settled by the jury under the instructions of the Court.

The patent is held conclusive evidence that the land conveyed was placer ground.—*Dahl v. Raunheim,* 132 U. S. 260, 33 L. Ed. 324, 10 Sup. Ct. Rep. 74, 16 M. R. 214; *Butte Co. v. Sloan,* 16 Mont. 97, 40 P. 217. There are expressions in both

these opinions which, taken by themselves, would read that the patent was conclusive proof that no lode existed, but to so decide on consideration of the whole case was evidently not the intention of the Court.

The practical conclusion from this vexed state of the title, arising from the unwise reservation from a government grant of a piece of land with no defined bounds and even without acknowledged existence, is that a lode within placer lines should assert itself by adverse against the placer application at the outstart, so as to avoid subsequent departmental inquiry. —26 L. D. 573; 27 *Id.* 676. And where the application is by the lode claimant over a prior placer patent, the safe course is for the placer to adverse if the facts exist upon which to contest the title of the lode claimant.

Proof of Known Lode by Contiguity.

Running a lode survey over placer lines raises no inference that the vein enters within them.—*Raunheim v. Dahl,* 6 Mont. 167, 9 P. 892; *Dahl v. Raunheim,* 132 U. S. 260, 33 L. Ed. 324, 10 Sup. Ct. Rep. 74, 16 M. R. 214, 26 L. D. 622. Nor is it sufficient that quite a number of shafts sunk elsewhere in the district disclosed horizontal deposits which might be parts of a vein of continuous extension through all that territory.—*Sullivan v. Iron Silver Co.,* 143 U. S. 431, 36 L. Ed. 214, 12 Sup. Ct. Rep. 555. Nor does the granting of a patent subsequent to the placer patent over the placer ground raise any conclusive presumption. The question in such case is then an extrinsic issue dependent on proof.—*Iron Silver Co. v. Campbell,* 135 U. S. 286, 34 L. Ed. 155, 10 Sup. Ct. Rep. 765, 16 M. R. 218, 25 L. D. 460.

Locating Lode Within Placer.

The placer owner, or a stranger with his consent, may locate a lode claim within the placer survey.—*McCarthy v. Speed,* 11 S. D. 362, 50 L. R. A. 184, 77 N. W. 590, 19 M. R. 615. And doubtless the discoverers without such owner's consent

by peaceable entry may make such location.—2 Lindley, Sec. 413.

It has been held that no third party can enter within the lines of a placer location to prospect for lodes. And if he does so enter, discover and locate a lode, it is a claim initiated by trespass and is void.—*Clipper Co. v. Eli Co.,* 194 U. S. 220, 48 L. Ed. 944, 24 Sup. Ct. Rep. 632.

This practically gives all blind lodes to the placer owner and thereby defeats the intent of the Act of Congress. But it is within the limits of judicial construction and is therefore a binding authority to the extent of the decision. But it does not go to the extent of preventing an entry to locate upon a visible outcrop; nor can a placer location be so made as to cover the lode formation unless it is properly placer ground and has a valid existence as a *bona fide* placer claim.—*Searle Placer,* 11 L. D. 441.

Where the claim is a placer alleged to carry gold, it should be gold that can be "secured with profit."—*United States v. Iron S. Co.,* 128 U. S. 684, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195.

In contest between a placer claim and an older lode title which the placer lines enclosed, the burden of proof is on the placer to show that there was no such metallic vein as justified a lode location.—*Bevis v. Markland,* 130 F. 226.

Width of Such Lode Claim.

Where the location of the lode is made within the bounds of the placer location, and after the date of the placer location, it has been held that the lode claimant is restricted to fifty feet in width.—*Mt. Rosa Co. v. Palmer,* 26 Colo. 56, 77 Am. St. Rep. 245, 50 L. R. A. 289, 56 P. 176, 19 M. R. 696. But where the lode was not only known to exist, but was a valid location prior to a placer location, the lode is entitled to its full width as staked against the placer locator or patentee. —*Noyes v. Mantle,* 127 U. S. 348, 32 L. Ed. 168, 8 Sup. Ct. Rep. 1132, 15 M. R. 611. See 28 L. D. 41; 32 *Id.* 513.

TAILINGS.

Each Claim Must Take Care of Its Own.

R. S. Colo. Sec. 4214.—In no case shall any person or persons be allowed to flood the property of another person with water, or wash down the tailings of his or their sluice upon the claim or property of other persons, but it shall be the duty of every miner to take care of his own tailings, upon his own property, or become responsible for all damages that may arise therefrom.—*Sec. 9, Nov. 7, 1861.*

The Relation of One Claim to Another Where Both Are

situate in the same gulch or on the same waterflow was sought to be regulated by the above section passed at an early date which fixed in terms a matter of long continued dispute in California. The tendency of the later decisions is to the effect that the upper claim can not justify covering up the lower claim on the plea of either custom, priority or necessity.—*Lincoln v. Rodgers,* 14 M. R. 79, 1 Mont. 217; *Fitzpatrick v. Montgomery,* 20 Mont. 181, 63 Am. St. Rep. 622, 50 P. 416.

The extent to which the miner may foul the water and his duty to impound are discussed in *Provolt v. Bailey,* 62 Or. 58, 121 P. 961.

Upper and Lower Claim in Same Gulch.

Notwithstanding the above Act or similar local legislation elsewhere, the natural invitation of the stream to utilize its current is a temptation too potent to be resisted. No placer, barring exceptional instances, can be conveniently worked without encroaching more or less upon the claims below. This leads on the one side to trespass, on the other side to concessions, and their relations thus become involved with questions of license, contract and estoppel.

The legal right of the claim to be exclusively enjoyed by its own occupant is plain with or without the aid of the Statute, subject to such considerations as courts of equity

will give to the hardship of denying the use of a natural outlet to a claim so situate to its neighbors on the stream below that its use of the stream is a physical necessity. The upper claim is therefore not denied the right to rush its tailings across the lower claim if they are not allowed to lodge upon such claim.

Slight Injury to Lower Claims.

The owner is not liable for pollution of stream incidental to placer mining, or to washing iron ore. It is classed among non-actionable injuries. Nor will such use of the stream be enjoined even if an action lies, except in willful or extreme cases.—*Clifton Co. v. Dye*, 87 Ala. 468, 6 So. 192; *Hill v. King*, 4 M. R. 533, 8 Cal. 337; *Atchison v. Peterson*, 1 M. R. 583, 20 Wall. 507, 22 L. Ed. 414.

But a material injury will be prevented by writ or compensated by damages.—*Columbus Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, 12 L. R. A. 577, 26 N. E. 630; *Tennessee Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; *Drake v. Lady Ensley Co.*, 102 Ala. 501, 48 Am. St. Rep. 77, 24 L. R. A. 64, 14 So. 749; *Hindson v. Markle*, 33 Atl. 74, 171 Pa. 138.

Injunctive Relief Against Deposit Of.

Where there is neither license nor the protection of a prior location for tailing purposes and the ground below has been taken up by other parties, it is plain that the upper can not lawfully use the lower claim as a place of deposit.—*Fuller v. Swan River Co.*, 16 M. R. 252, 12 Colo. 12, 19 P. 836; *Cheesman v. Hale*, 31 Mont. 577, 3 Ann. Cas. 1038, 68 L. R. A. 410, 79 P. 254. To do so would be an invasion of the legal rights of the lower claimant for which he might recover damages, but it does not follow that in every case the courts would interfere to restrain the upper claimant by injunction.

And if the lower claims could be shown to have been located or purchased for any purpose of annoyance to the upper

claims, the want of equity in such case upon an application for injunction would be manifest.—*Edwards v. Allouez M. Co.*, 7 M. R. 577, 38 Mich. 46, 31 Am. Rep. 301. Placer company enjoined at suit of water works against fouling stream.—*Travis Co. v. Mills*, 94 F. 909, 37 C. C. A. 536. At suit of the county as a public nuisance.—*Yuba County v. Kate Hayes Co.*, 141 Cal. 360, 74 P. 1049; *Sutter County v. Nicols*, 93 P. 872, 152 Cal. 688, 14 Ann. Cas. 900, 15 L. R. A. (N. S.) 616.

The incidental flow of mud and fine tailings not sufficient to accumulate as deposit, but affecting only the character of the water or causing but slight damage, if an injury at all, is not such as to be interfered with by injunction.—*Atchison v. Peterson, supra; United States v. N. Bloomfield Co.*, 53 F. 625, 631.

An injunction against tailings will not issue where there is a remedy at law and the injunction would result in the discharge of a great number of employees.—*McCarthy v. Bunker Hill Co.*, 147 F. 981.

Where a coal company could by reasonable outlays prevent stream pollution a preliminary injunction should be allowed. —*Roaring Creek Co. v. Anthracite Co.*, 212 Pa. 115, 61 Atl. 811.

A boom ditch was enjoined in *Carson v. Hayes*, 39 Or. 97, 65 P. 814, and hydraulics in *York v. Davidson*, 39 Or. 81, 65 P. 819, 21 M. R. 452.

Complaint for damage from tailings and stream pollution set forth at length and held sufficient.—*Hill v. Standard M. Co.*, 12 Ida. 223, 85 P. 907.

Joint Contribution to Injury.

Where several mills or mines contribute to the common injurious result, they may be sued jointly where injunctive relief is asked, but for damages must be sued separately, and where several neighboring plaintiffs suffer a common injury they may join in the equity proceeding, but in an action for damages each party must sue and defend separately.—*Madison*

v. Ducktown Sulphur Co., 113 Tenn. 331, 83 S. W. 658; *Warren v. Parkhurst*, 45 Misc. 466, 92 N. Y. S. 725; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 58 N. E. 142, 21 M. R. 38; *Watson v. Colusa-Parrot Co.*, 31 Mont. 513, 79 P. 14; *Norton v. Colusa P. M. S. Co.*, 167 F. 202.

But this distinction is not always made and in some States they are held jointly liable in damages.—*Day v. Louisville C. Co.*, 60 W. Va. 27, 10 L. R. A. (N. S.) 167, 53 S. E. 776.

In *Sutter Co. v. Nicols*, 93 P. 872, 152 Cal. 688, 14 Ann. Cas. 900, 15 L. R. A. (N. S.) 616, the discharge of tailings into a river was enjoined as a nuisance.

Necessities of the Mine.

The general ruling is that the fact that the use of the stream is a physical necessity to enjoy the mine or well is no defense.—*Bowling Co. v. Ruffner*, 117 Tenn. 180, 10 Ann. Cas. 581, 9 L. R. A. (N. S.) 923, 100 S. W. 116; *Straight v. Hover*, 79 Ohio St. 263, 22 L. R. A. (N. S.) 276, 87 N. E. 174; but there are cases which hold that the rights of the riparian owner must yield to the business interests of the country.—*Ohio Oil Co. v. Westfall*, 43 Ind. App. 661, 88 N. E. 354; *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454, 24 L. R. A. 568, 34 N. E. 600, 35 N. E. 117.

Tailings Are Property of the Miner Who Made Them, so long as retained on his own land or under his control and not abandoned.—*Jones v. Jackson*, 9 Cal. 237, 14 M. R. 72. When allowed to flow upon the land of another he becomes entitled to them.—*Id.* They belong to the lessee for the time being—but not after he has ceased acts of ownership.—*Erwin's App.*, 16 M. R. 91, (Pa.) 12 Atl. 149. Mill tailings, when not abandoned.—*Goldfield Co. v. Old Co.*, 38 Nev. 426, 150 P. 313.

Location of Dump Ground.

It has been held in *Jones v. Jackson, supra*, that a reasonable amount of ground below a mining claim proper may be located

as a dump or place of deposit for tailings. The same case holds that mere posting of notice would not be sufficient to hold such ground. We would advise as strict a location, including staking, notice and record, as should be made in the case of the location of the mining or ditch claim, to which such tailings claim may be appurtenant. In the nature of things the boundaries of such a claim also would be strictly confined to the absolute needs of the upper claim; nor do we consider that such located easement would hold indefinitely without user. It is a claim not so much of express right as of necessity. The doctrine, however, that an easement may be created on public land is distinctly held in the above case, and in *Lincoln v. Rodgers, supra; O'Keiffe v. Cunningham,* 9 M. R. 451, 9 Cal. 589. In *Miser v. O'Shea,* 37 Or. 231, 82 Am. St. Rep. 751, 62 P. 491, such right is expressly denied.

A deposit of valuable tailings on public land will be protected against an attempt to locate the same as a placer.—*Ritter v. Lynch,* 123 F. 930. The word "tailings" by usage of the parties construed to include "slag."—*Butte Co. v. Montana Co.,* 121 F. 524, 58 C. C. A. 634.

Mill Tailings.

A mill owner, though the prior appropriator, has no right to flow tailings into a stream when at slight cost they could be so impounded as not to materially foul the water.—*Suffolk Co. v. San Miguel Co.,* 9 Colo. App. 407, 48 P. 828. A mill will not be allowed to so pollute the water as to render it unfit for use by prior irrigation appropriators.—*Montana Co. v. Gehring,* 75 F. 384, 385, 21 C. C. A. 414.

The rights and duties of two mills using the same water, one above and one below, are fairly stated in *Otaheite Co. v. Dean,* 102 F. 929, 20 M. R. 688.

Location Upon Deposits of Tailings.

Vacant land upon which tailings have been deposited may be claimed and worked the same as land containing natural

deposits, and trespass maintained by the claimant against a party carrying away such tailings.—*Rogers v. Cooney,* 14 M. R. 85, 7 Nev. 213.

A party may take up a claim for mining purposes which has been and still is used as a place of deposit for tailings by another—but in such case his mining right would be subservient to the prior right of deposit.—*O'Keiffe v. Cunningham, supra.* On the other hand, the right to dump may be lost by allowing the mining claimant to hold exclusive adverse possession.—*McLaughlin v. Del Re,* 71 Cal. 230, 16 P. 881.

The Debris Cases.

On the plea of interference with navigable waters the United States has, on the San Joaquin and Sacramento Rivers, in California, prohibited all hydraulic mining, except under government license and regulation. The Act of 1893 (27 St. L. 507. Amended, 1907, 34 St. L. 1001) makes such mining a misdemeanor unless carried on by federal supervision. This Act and the decisions under it are the final outcome of what SAWYER, J., candidly calls "a suit between the mining counties and the valley counties."—*Woodruff v. North Bloomfield Co.,* 18 F. 753, 792, 9 Sawy. 441. There are obvious constitutional points arising out of such an act, but it has been thus far sustained.—*United States v. N. Bloomfield Co.,* 81 F. 243; *North Bloomfield Co. v. United States,* 88 F. 664, 32 C. C. A. 84; *Sutter County v. Nicols,* 93 P. 872, 152 Cal. 688, 14 Ann. Cas. 900, 15 L. R. A. (N. S.) 616.

The reference to this Act and to the opinion in 88 Federal Reporter, renders it unnecessary to further cite the numerous cases almost uniformly adverse to the miner, which led up to it. Some of them were so harsh as to suggest that judicial power had reached its limits.—9th Ed. p. 182.

Smelter Fumes.

Injunction refused against smelter fumes destroying timber, and plaintiff left to its remedy at law for damages.—*Mountain Copper Co. v. United States,* 142 F. 625, 73 C. C. A. 621.

Injunction against smelter fumes refused if defendant pay actual damages. Comparative values of the investment and the property injured considered.—*McCleery v. Highland Boy Co.*, 140 F. 951.

Smelter continued under injunction after enormous expenditures toward suppressing the fumes.—*Georgia v. Tennessee Copper Co.*, 237 U. S. 474, 59 L. Ed. 1054, 35 Sup. Ct. Rep. 631, 237 U. S. 678, 59 L. Ed. 1173, 35 Sup. Ct. Rep. 752, 240 U. S. 650, 60 L. Ed. —, 36 Sup. Ct. Rep. 465.

NUISANCE.

Analogous to the last heading is the subject of actions against smelters for destruction of crops and other like injuries by noxious fumes; the pollution of streams, etc. The subject is fairly considered in *Madison v. Ducktown Sulphur Co.*, 113 Tenn. 331, 83 S. W. 658, which goes into the matter of doing justice between all parties where the injury is substantial but practically non-preventable without undue loss to the defendant.—*McCleery v. Highland Boy Co.*, 140 F. 951.

The statute of limitations does not begin to run until the injury is complete.—*Sterrett v. Northport Co.*, 30 Wash. 164, 70 P. 266.

Mine enjoined from polluting waters of stream used by distillery.—*Young v. Bankier Distillery*, L. R. (1893) App. C. 691.

The pollution of a fresh water stream by salt well was enjoined in *Strobel v. Kerr S. Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 21 M. R. 38, 58 N. E. 142.

MILL SITES.

Extent—How Patented.

R. S. Sec. 2337.—Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the *superficies* of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.—*Sec. 15, May 10, 1872.*

Location and Record.

Mill sites are located by posting notice and staking by a substantial post or stake at each angle, which ordinary prudence would require to be inscribed with the name of the mill site and the number of the corner. There are no Congressional regulations of the details of such location, but its record should conform to the requirements applicable to the record of all classes of claims, to-wit, that it contain a sufficient description by reference to natural objects or permanent monuments; which terms of the statute are no more than a statement of what is required as a matter of course without such statute. In other words, where any record whatsoever is essential to either original claim or conveyance, it must contain a description sufficient to identify the land intended to be described.

In Colorado the form in use is the statutory wording prescribed for all cases of location of non-mineral lands, R. S., Sec. 5124.

Post location notice at some conspicuous point on the claim, in substance as follows:

LOCATION NOTICE.

I claim the *Corinne* mill site as staked on this ground, 466 feet square. Five acres. Date of location January 2, 1906.

THOMAS W. FITCH, JR.

And make record in the proper county of the

LOCATION CERTIFICATE OF MILL SITE.

TO ALL WHOM THESE PRESENTS MAY CONCERN: Know ye that *I, Thomas W. Fitch, Jr., of Pittsburgh,* County of *Allegheny,* Commonwealth of *Pennsylvania,* do hereby declare and publish as a legal notice to all the world that I have a valid right to the occupation, possession and enjoyment of all and singular that tract or parcel of land, not exceeding five acres, situate, lying and being in *Pioneer* Mining District, in the County of *Dolores,* in the State of Colorado, bounded and described as follows, to-wit: The *Corinne* mill site, *beginning at corner No. 1, from which etc. (description continued)* to the place of beginning.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my hand and seal this *27th* day of *January,* in the year of our Lord one thousand nine hundred and sixteen.

THOMAS W. FITCH, JR. [SEAL.]

For form of acknowledgment see *page 313.*

A name is not *essential* to a mill site, but it is convenient and preferable to style it by a name.

Location and record should be accompanied or followed by substantial occupancy or valid improvements. The digging of a ditch is not the location of a mill site. "Land is appropriated by one character of acts, water by another."—*Robinson v. Imperial Co.,* 10 M. R. 370, 377, 5 Nev. 44.

By the U. S. Law They Are Limited to Five Acres, But by the district regulations were sometimes restricted to much less extent.

A square location 466.69 x 466.69 feet contains five acres.

They Can Not Lawfully Be Located on Mineral Land.

—8 L. D. 195; 18 *Id.* 105. And if so located may be contested by proceedings in the Land Office.—5 L. O. 51.

The location of a mill site not known to contain mineral at the time of its location will hold against a lode claim based upon a discovery after the mill site location was complete. The finding of mere nominal lode values does not make the land mineral in character at any time, and the discovery of real mineral values will not destroy a mill site completely located before any such mineral value was known.—*Cleary v. Skiffich,* 28 Colo. 362, 89 Am. St. Rep. 207, 21 M. R. 284, 65 P. 59.

In *Hartman v. Smith,* 7 Mont. 19, 14 P. 648, it was held that a mill site was a mining claim and as such excluded from a town site patent. In *Cleary v. Skiffich,* 28 Colo. 367, 89 Am. St. Rep. 207, 65 P. 59, 21 M. R. 284, the Court says: "A mill site is a mining location." In the latter case the expression is a mere introductory clause. But to chance the exclusion of a mill site claim from a town site patent on the forced or technical meaning of one word, would be to assume grave risk. *Bona fide* prior location for ranch purposes will defeat a mill site.—*Hamburg Co. v. Stephenson,* 17 Nev. 450, 30 P. 1088.

The holder of a lode claim who bought in a mill site to protect his title may defend his rights under either record.—*Worthen Mills v. Alaska Co.,* 229 F. 966.

Two Classes of Mill Sites.

The latter clause of Sec. 2337, *supra,* provides for patenting of land actually occupied by a mill, but the former and more important portion of the section provides a means of procuring surface area to cover such ground as may be used in any manner incidental to the mine.

First Class—Mill Site With Lode.

Congress allows to each lode claimant the privilege of taking up five acres of ground, upon the theory that such additional surface is, or may be, needed either incidentally for the operation of the mine (storage room, boarding houses, miners' cabins, ore houses, etc.) or indirectly by a mill, patio, arastra,

or other works for treating ore. In fact, any largely operated mine does require such space, if not more. The land so needed is strictly within the intent of the law, and though no mill may be erected or contemplated, such area of surface is styled a mill site.

The land taken under this clause must be:

1. Non-mineral.

2. Non-contiguous to the lode.

3. Used or occupied by the owner for mining or milling purposes.—13 L. D. 175; 32 *Id.* 128; 34 *Id.* 325.

1. Non-Mineral.

The test on this point, following analogous rulings between agricultural and mining claims, would be: Has the land greater value for its mineral, or for surface use in connection with the mine?—13 L. D. 86, 517.

The form of proof of such non-mineral character is by the affidavits of disinterested witnesses.

2. Contiguity.

It was formerly held that the mill site must be non-contiguous to the lode, or to any line of its survey.—32 L. D. 128, 34 L. D. 320. But these rulings have been modified to the extent of allowing a mill site to touch a side line of the lode claim.—37 L. D. 674. Or even an end line where it is already shown that the lode does not reach such end line.—42 L. D. 434.

3. What Is Sufficient Use.

The building on the land of a pumping plant to carry water to the mine is a sufficient mining use.—11 L. D. 338. Or storing water on the same for the mine.—13 *Id.* 175. Use for storing ores or for tailings, shops or houses for workmen.—5 *Id.* 192. Or for houses for workmen on the mill.—14 *Id.* 173.

The use of a cabin on the land for storing tools was held sufficient in *Hartman v. Smith,* 7 Mont. 19, 14 P. 648. This

case practically decides that the ordinary use of a prospector's cabin, wherever it may be located, if not on ground contiguous to the lode, is enough to justify the claiming of the site of the same as a mill site. Cited and followed in *Valcalda v. Silver Peak Mines,* 86 F. 90, 29 C. C. A. 591, 19 M. R. 233, 42 L. D. 255.

Insufficient Use.

The mill site section can not be availed of to patent water rights proper.—6 L. D. 706, 9 *Id.* 201, 12 *Id.* 624. Or for the benefit of a third party.—11 *Id.* 561. The benefit must be to the particular lode in question.—10 *Id.* 196.

A lode owner has no right to attach to his patent application, at the request of a third party, an independent piece of ground as a mill site.—*Hamburg Co. v. Stephenson,* 17 Nev. 449, 30 P. 1088.

Land for its timber can not be located as a mill site, though the timber be used and needed at the mine.—7 L. D. 557. Timber has always been considered as a mining necessity, and the taking of it for such purpose clearly puts the land to a mining use.—*Tartar v. Spring Creek Co.,* 5 Cal. 395, 14 M. R. 371; *Wilson v. Smith,* 5 Yerg. (13 Tenn.) 379; *Findlay v. Smith,* 6 Munf. (Va.) 134, 8 Am. Dec. 733, 13 M. R. 182. But the Land Office rulings have not recognized this contention.

A boarding house, store, saw mill and wharf held insufficient mining use, where a group of mill sites was attempted to be patented with a group of lodes.—32 L. D. 128.

Second Class—Mill or Reduction Works.

Under this class, where the application is for the mill site alone, there must be a mill or reduction works—incidental uses are not sufficient. That the site contains a dam, penstock and pipes for driving works at a neighboring mine will not answer.—9 L. D. 460, 29 *Id.* 143. And a patent will not issue to give additional ground to a mill site already patented.—12 *Id.* 75. Nor on two adjoining mill sites with improvements on

the line between them.—14 *Id.* 11. It will not be allowed on the strength of carrying water to a smelter on other ground. —5 *Id.* 190.

Separate Application for Mill Site.

It has been ruled that where a lode has gone to patent the owner may afterwards by separate application obtain a patent on a mill site used in connection with the lode, and that such application need not show an actual mill on the ground. Such mill site is allowed to go to patent on the theory that every lode is entitled to a mill site, and it is a matter of indifference to the department whether the owner applies for the patent on lode and mill site together or separately.—22 L. D. 496, L. O. Reg. 62. A separate mill site for each lode in a group was disallowed in 32 L. D. 128. Where more than one mill site is applied for, reason for the necessity must be shown.—34 L. D. 325.

The $500 Improvements on the Lode Are Sufficient to Enter both lode and mill site, if the mill site is used or occupied by the applicant for mining or milling purposes.—8 L. D. 195.

Proof of Improvements.

The early practice of the Land Office was to patent a mill site when applied for in connection with a lode, without proof of either use or improvements. This practice was taken advantage of to patent building lots, and all sorts of claims as mill sites, but the department now requires proof not only that it is non-mineral land, but that it is used for milling purposes or in connection with the mine—instances of such being above given.

This proof of the use of the site in connection with the mine is by affidavit of the applicant and of two disinterested witnesses. Intention to use is not sufficient.—14 L. D. 544.

Adverse and Protest.

When a mill site application conflicts with a prior claim of another to the ground for like purposes it may be adversed;

or it may adverse or be adversed by a lode or placer.—1 L. D. 566; Rev. Ed. 555. Where in conflict with a mineral claim it may be defeated by a protest and proof of being located on mineral land.—4 L. O. 3; 5 *Id.* 51. It should protest a lode.—36 L. D. 144. But see further on this point under ADVERSE CLAIM, *post* p. 608.

SEVERANCE.

Separation of Surface and Mineral Estate.

The ownership of the minerals may be vested in one, while the ownership of the surface is in another. This severance is often created by deed, in which case it amounts practically to a partition on a horizontal plane, the two estates being entirely separated, except that from the nature of the case, the surface owner can usually claim the right of support, while the mine owner can claim such incidental use of the surface as is necessary to enable him to win the minerals.—*Caldwell v. Fulton,* 3 M. R. 238, 31 P. 475, 72 Am. Dec. 760; *Horner v. Watson,* 14 M. R. 1, 79 P. 242, 21 Am. Rep. 55; *Marvin v. Brewster Co.,* 13 M. R. 40, 55 N. Y. 538, 14 Am. Rep. 322; *Baker v. Pittsburg C. Co.,* 68 Atl. 1014, 219 Pa. 398.

When minerals are so severed they form a separate part of the freehold and the estate is not a mere easement.—*Bonson v. Jones,* 89 Iowa 380, 56 N. W. 515; *McConnell v. Pierce,* 210 Ill. 627, 71 N. E. 622; *Plummer v. Hillside Co.,* 104 F. 208, 43 C. C. A. 490.

If the surface owner take the minerals he is a trespasser.—*Ashman v. Wigton,* (Pa.) 12 Atl. 74, 17 M. R. 117.

Where there has been a severance of the surface from the minerals there is no privity between the estates.—*Hutchinson v. Kline,* 199 Pa. 564, 49 Atl. 312; and their owners are not tenants in common.—*Virginia Co. v. Kelly,* 24 S. E. 1020, 18 M. R. 395, 93 Va. 332.

Where the mineral and surface rights have been severed, the possession of the surface owner is not adverse to the mine owner even where such surface owner holds by deed which conveyed the property generally without reference to the previous severance.—*Crowe Co. v. Atkinson,* 85 Kan. 357, Ann. Cas. 1912D, 1196, 116 P. 499.

Parol evidence is not admissible that a deed of all coal under certain lines was intended to be limited to one particular vein.—*King v. New York Co.,* 54 Atl. 477, 22 M. R. 515, 204 Pa. 628.

Extent of Surface Rights.

The right of entry on surface can not be enlarged so as to allow the erection of coke ovens—and its use for powder house, blacksmith shop and supply stores depends upon the circumstances of the case as found by the jury.—*Williams v. Gibson,* 84 Ala. 228, 5 Am. St. Rep. 368, 16 M. R. 243, 4 So. 350. The mine owner may erect hoisting plant.—*Wardell v. Watson,* 5 S. W. 605, 93 Mo. 107.

The owner of the coal bed has the right to remove as much of the overlying stratum as is necessary to work the coal, and the right to use the space to carry foreign coal by instroke—but the ownership ceases upon exhaustion of the coal.—*Moore v. Indian Camp Co.,* 80 N. E. 6, 75 Ohio St. 493.

The surface owner has the right to bore an artesian well through the coal bed.—*Pennsylvania Co. v. Lehigh Valley Co.,* 250 Pa. 300, 95 Atl. 471.

Injunction lies to prevent the surface owner obstructing the mineral owner.—*Porter v. Mack Co.,* 64 S. E. 853, 65 W. Va. 636.

Mining Under Improvements.

By statute in Colorado (R. S. Sec. 4213, 4217) the mine owner is bound to secure the owner of the surface improvements if he attempts to mine under any such improvements. Such statutes are no great departure from the common law which compels each estate to be enjoyed with proper regard

to the rights of the sub-owner or superficial owner as the case may be, and would enjoin mining under valuable improvements if irreparable injury were threatened by such mining.

Surface Support.

Where the estates are severed the surface owner has the absolute right to vertical support.—*Youghiogheny Co. v. Hopkins,* 198 Pa. 343, 21 M. R. 188, 48 Atl. 19. And the rulings have upheld this right to extreme lengths. A lease to mine "all the coal" does not give the right to deprive the surface of support.—*Mickle v. Douglas,* 75 Iowa 78, 17 M. R. 137, 39 N. W. 198; *contra, Miles v. New York Co.,* 250 Pa. 147, 95 Atl. 397. But the surface owner is not entitled to lateral support.—*Matulys v. Philadelphia Co.,* 201 Pa. 70, 21 M. R. 745, 50 Atl. 823. And surface support may be waived by express covenant.—*Miles v. Pa. C. Co.,* 63 Atl. 1032, 214 Pa. 544.

But the above paragraph is too concise to give all the law on this subject. The point as to whether there is an implied covenant for surface support in a grant of all the coal or other mineral has been the subject of vast discussion in all the English courts, including the House of Lords. An unusually learned opinion in *Kuhn v. Fairmont C. Co.,* 179 F. 191, 199, 102 C. C. A. 457, reviews the cases and holds with the West Virginia Supreme Court, that a grant of all the coal is a waiver of the right of support.—*Griffin v. Fairmont C. Co.,* 59 W. Va. 480, 2 L. R. A. (N. S.) 1115, 53 S. E. 24; *Stilley v. Pittsburg Co.,* 234 Pa. 492, 41 L. R. A. (N. S.) 236, 83 Atl. 478.

Instances of Severance.

The surface and the subjacent strata are rarely owned by separate parties on the Western Slope except where placer gold or lodes have been discovered in towns before entry under the Town Site Acts; or in instances where conflicting claims have been compromised by deed, one party taking the surface and improvements, the other the veins underneath.

But the subject is important in the Western States chiefly with reference to the question of whether claims located on government land and claims patented by the government take both surface and minerals in all cases, or whether in any case there is an actual or implied severance of the minerals from the surface, either from the nature of the claim or from the language of patents confirming the claim.

Patented Claims Generally.

As to patented claims it has been the policy of the government to grant the entire estate, and retain no interest with the patentee. It has been so held in the case of a Mexican grant confirmed by patent, although under the original grant the claimant had received no title to the mines of gold and silver from the Mexican government. It was considered that the confirmatory patent of the United States conveyed the soil, and everything under the soil, and that if the government had intended to reserve the royal metals, as the Mexican Republic had done, it should have been so expressly stated in the patent.—*Moore v. Smaw,* 12 M. R. 418, 17 Cal. 199, 79 Am. Dec. 123.

In Patents to Lode Claims, Both Surface and Minerals are conveyed in terms.

Placer Claim Patents Convey Not Only the Placer Deposits and the surface, but also all veins except those known to exist when the application for patent was filed, which are expressly excepted.

As to Mill Site Patents It Is Required That Such Claims be located on non-mineral land.

But aside from the clause referring to the rights of the proprietors of lodes dipping underneath, which is common to all classes of patents, they seem to be a general grant of the land

which they enclose, which grant would cover all lodes and mineral rights.

A valid lode claim overlying the ground could have protected its rights by an adverse; and not only do the general rules of construction favor the proposition that a mill site patent conveys all lodes and deposits found within its lines, but the government having undertaken to decide the mineral or non-mineral character of the ground before the patent issues and thereupon to issue an absolute grant, such grant carries both the soil and what is under the soil.—*Gale v. Best,* 78 Cal. 235, 12 Am. St. Rep. 44, 20 P. 550, 17 M. R. 186.

As to Patented Agricultural Claims Obtained in Good Faith, not at the time of entry known to be mineral land, minerals afterwards discovered certainly belong to the patentee; but where land has been entered as agricultural upon which mineral locations existed, in defiance of the rights of mineral claimants, such patents could be set aside in favor of the mineral claimants, and it was *held* in the case of *Gold Hill Co. v. Ish,* 5 Or. 104, 11 M. R. 635, that such a patent was absolutely void as to the land covered by the mining claim. But the case discards the now well settled rule that a patent, howsoever procured, operates to pass the legal title, and in such cases the holder should be declared a trustee for the use of the owner of the mine.—*Salmon v. Symonds,* 30 Cal. 301, 302. See page 177.

Old worked-out claims do not invalidate an agricultural patent.—*United States v. Reed,* 28 F. 482.

Lodes Dipping Under Patents.

It may as well be observed under this head that all patents, agricultural as well as mineral, are supposed to contain a reservation of the right of lodes apexing outside their bounds, to dip underneath their lines. See page 213.

The authority to insert this clause in agricultural patents is doubted in *Paterson v. Ogden,* 141 Cal. 43, 99 Am. St. Rep. 31, 74 P. 443.

School Lands.

Section 16 of each township, if non-mineral, since the organization of the federal government, and in later years, section 36, and in some states additional sections, have been reserved from sale and granted to the respective states upon their admission, such sections in the territories being held by the government by an implied trust to that effect.—8 L. D. 495. The words of grant to the several states are not uniform but in general the title passes upon approval of the survey.—7 L. D. 459, 9 *Id.* 408; *Cooper v. Roberts,* 18 How. (59 U. S.) 173, 15 L. Ed. 338.

Minerals are reserved in the school grants to certain states and not in others, with enumeration of each list. They are not reserved in Utah.—*Sweet v. U. S.,* 228 F. 421.

Until survey they are open to discovery of mineral and location of mineral claims upon them the same as upon the rest of the public domain.

When the mineral character of such reserved sections was known before survey the title to no part of the same passes to the state, and claims may be located upon them.—5 L. O. 178; *Heydenfeldt v. Daney Co.,* 93 U. S. 634, 23 L. Ed. 995, 13 M. R. 204; *Ivanhoe Co. v. Keystone Co.,* 13 M. R. 214, 102 U. S. 167, 26 L. Ed. 126; *Nevada Co. v. Spriggs,* 41 Utah 171, 124 P. 770.

But where their mineral character has been discovered since they were surveyed, such subsequent discovery of mineral will not divest the title which has already passed.—7 L. D. 459, 9 *Id.* 408. And the states have control of their sale and disposal. Before admission as a state a territory has no such control.—4 L. D. 390.

Where lands are mineral at date of the reservation they do not pass to the state upon the subsequent abandonment of the mines.—*Hermocilla v. Hubbell,* 26 P. 611, 89 Cal. 5.

The determination of non-mineral character by the Land Office is not subject to collateral attack.—*Saunders v. La Purisima Co.,* 125 Cal. 159, 57 P. 656, 20 M. R. 93.

Lieu Lands.

Under the act reimbursing states for mineral lands lost on account of their mineral character, location may be made before final approval of the selection.—*Buena Vista Co. v. Honolulu Co.*, 166 Cal. 71, 134 P. 1154, 27 L. D. 411, 29 L. D. 181.

Patented Town Sites.

In this case there is an express severance of the minerals. The holder of the lot takes no title to any located claims. The lot is subject to entry to get the mines of gold or silver which it may contain.—R. S. Secs. 2386, 2392.

These sections are supplemented, if not supplied, by an act approved March 3, 1891, as follows:

Reservation of Mineral Rights From Town Sites.

Sec. 16.—That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper or lead, or to any valid mining claim or possession held under existing law.

When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto:

Provided, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.—26 St. L. 1101, Comp. L. 1901 p. 1535.

A town site entry under the above act must conform to legal subdivision when made upon surveyed lands, as required by R. S. Sec. 2389.—33 L. D. 542.

The town patent, where valid mining locations have been made within its limits, does not grant the minerals.—*Moyle v.*

Bullene, 7 Colo. App. 308, 44 P. 69, 26 L. D. 144, 29 L. D. 89; nor where the land was known to be mineral at time of entry. —29 L. D. 426, 31 *Id.* 88. Under the terms of the second paragraph of the present act it seems clear that lode or placer patents can issue for such claims within the town limits.—25 L. D. 518, 34 *Id.* 102, 276. If the mine was located after the occupation of the surface by the lot owner, but before the entry of the town site for patent, the mines and surface are then separate estates, each to be enjoyed under the various applications of the maxim: *sic utere tuo ut alienum non laedas.*—*Smoke House Lode Case,* 6 Mont. 397, 12 P. 858; *King v. Thomas,* 6 Mont. 409, 12 P. 865; *Deffeback v. Hawke,* 115 U. S. 392, 29 L. Ed. 423, 6 Sup. Ct. Rep. 95.

Under the various reservations in favor of mines out of town site patents, under the acts in force before 1891, it has been decided that discovery of mineral after the patent issues is of no avail.—*Tombstone Townsite Cases,* 2 Ariz. 272, 15 P. 26; *Larned v. Jenkins,* 113 F. 634, 51 C. C. A. 344. That a location not valid on account of indefinite description is not excluded.—*Blackmore v. Reilly,* 2 Ariz. 442, 17 P. 72. Nor a location without a discovery.—*Regan v. Whittaker,* 14 S. D. 373, 85 N. W. 863, 21 M. R. 309. That only the lode, and not its surface, is excepted, at least under patents prior to 1872.—*Dower v. Richards,* 73 Cal. 477, 15 P. 105. That the mine must have been a known valuable and subsisting claim.—*Smith v. Hill,* 89 Cal. 122, 26 P. 644; *Davis v. Weibbold,* 139 U. S. 507, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628. In the last case it was also held that a reservation in a mining patent in favor of a lot claimant was a nullity because unauthorized. A lode once profitably worked and then abandoned is not excepted, though after the town site patent issues the lode is found to be still valuable.—*Dower v. Richards,* 151 U. S. 658, 38 L. Ed. 305, 14 Sup. Ct. Rep. 452, 17 M. R. 704.

The rights of the mine owner may be lost by laches or neglect to keep up the annual labor.—*Horsky v. Moran,* 21 Mont. 345, 53 P. 1064; *Emerson v. Kennedy M. Co.,* 169 Cal. 718, 147 P. 939.

A town site patent under R. S. Sec. 2392 issued in 1877 did not convey title to any valid claim. The distinction that it must be a mine of value does not apply to patents under that act.—*Callahan v. James,* 141 Cal. 291, 74 P. 853.

Golden v. Murphy is a case which reviews the law of mining rights reserved out of the townsite patent under Sec. 2392 and sustains the contention in favor of the lode.—31 Nev. 395, 103 P. 394, 105 P. 99.

Railroad Grants.

Minerals of known value are excepted in patents to the N. Pacific R. R. and in this case the defendant was enjoined from ousting one who had placer locations on building sand.—*Loney v. Scott,* 57 Or. 378, 32 L. R. A. (N. S.) 466, 112 P. 172. The patent to Central Pac. R. R. Co. excluded minerals, at least all minerals claimed prior to its issue.—*Van Ness v. Rooney,* 160 Cal. 131, 116 P. 392.

The burden is on the company to show the non-mineral character of the land. And the mineral title is established by a showing of ore sufficient to warrant further exploration.—43 L. D. 545.

Doubtful Policy of General Reservations.

Out of these attempted reservations of known lodes, mines, or minerals, by general terms under the acts providing for the patenting of different classes of land, only trouble, uncertainty and litigation ensue; the holdings, therefore, are usually strictly against them. And yet the fault is with the government attempting to protect such rights by sweeping clauses instead of allowing them to adverse or to come in as co-applicants—the mines become abandoned and the lot owner claims the whole estate, or they become of sudden value, tempting the miner to assert more than his rights. The same observations apply with greater force to the reservation of known lodes out of placers. The result in either case is that the sur-

face is disposed of, while the legal title to the minerals remains in the United States. The present practice is to allow an overlapping patent to the mineral claimant under certain conditions.—25 L. D. 518, 29 *Id.* 89, 426. Before the decision in the *South Star case,* cited p. 284, the department had required the surface patent to be set aside before they would take action.—*Pike's Peak Lode,* 10 L. D. 200; *Protector Lode,* 12 L. D. 662.

Unpatented Claims.

A lode claim covers the entire surface as well as the veins within it. Before the passage of the Mining Acts, it had been held *(Brown v. 49 Co.,* 15 Cal. 152, 76 Am. Dec. 468, 9 M. R. 600) that a lode location also included float gold below its apex, which had evidently come from that particular vein. It is evident, from the Congressional grant of the surface without excepting any form of deposit, that a lode location made in good faith upon an ore-producing vein, without the aid of any such decision, would include placer deposits within its lines both above and below the vein.

But an unpatented placer claim covers no lodes, and a lode claim may be located across it. If the holder of such claim discover mineral upon it he should stake and record the same, as a lode claim, and he has the same right as a stranger so to do, if he be the first to disclose such mineral value.—*McCarthy v. Speed,* 11 S. D. 362, 50 L. R. A. 184, 77 N. W. 590, 19 M. R. 615. An unpatented town site or ranch claim does not include either veins or deposits of gold or silver.

Where land has been returned as agricultural, the discovery and formal location of a lode or placer deposit over the same shifts the presumption to one in favor of the mineral claimant.—21 L. D. 502.

Mining Under Street or Highway.

The minerals under a street do not belong to the city or town.—*Leadville v. Bohn M. Co.,* 37 Colo. 248, 11 Ann. Cas.

443, 8 L. R. A. (N. S.) 422, 86 P. 1038; *Hamby v. City of Dawson Springs*, 126 Ky. 451, 12 L. R. A. (N. S.) 1164, 104 S. W. 259.

Mineral water considered a mineral, in construing the ownership of the minerals under a highway.—*Hamby v. City of Dawson Springs*, 126 Ky. 451, 12 L. R. A. (N. S.) 1164, 104 S. W. 259.

A highway across a mining claim is only an easement.—*O'Laine v. McGraw*, 164 Cal. 424, 129 P. 460.

In River Bed.

The state is the owner of minerals found in the bed of a navigable stream.—*Malcomson v. Wappoo Mills*, 86 F. 192. A mining claim may be located upon the bed of an unnavigable stream.—43 L. D. 248.

STATE LANDS.

In Montana, Nevada, and Wyoming the state lands are by statute open to prospectors. The state patent does not pass mines claimed under the Nevada Act.—*Stanley v. Mineral Union*, 63 P. 59, 26 Nev. 55.

By Colorado Act of 1905 (R. S. Sec. 5215) prospectors discovering mineral on state lands are allowed to pre-empt a claim 1500 by 300 feet whether lode or placer and ultimately to obtain the state's title to the same at a minimum price of $10 per acre.

LOCATION NOTICE ON STATE LAND.

I claim the *Admiral* lode (or placer) discovered by me on State land, 1,500 by 300 feet, 750 feet easterly and 750 feet westerly from this point, as staked on the ground this 14th day of July, 1915.

A. W. BROWN.

The above notice holds the claim for 90 days, during which time the discoverer must do $100 assessment work and stake

the claim and file a location certificate with the State Board of Land Commissioners and within one year must apply to the Board for either lease or deed. The forms on pp. 90 and 271 will suffice for location certificates and no record at all is required in the County Recorder's office.

TUNNEL SITES.

Line of Tunnel—Neglect to Work for Six Months.

R. S. Sec. 2323.—Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. —*Sec. 4, A. C. May 10, 1872.*

Record.

R. S. Colo. Sec. 4207.—If any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same specifying the place of commencement and termination thereof, with the names of the parties interested therein.—*Nov. 7, 1861.*

Line of Tunnel.

Immediately upon the passage of the Mining Act of 1872, containing the tunnel section above printed, controversy arose as to what was meant by the words "the line thereof."

The Land Office shortly published their construction that it meant "the width thereof and no more." This construction was adopted in the case of *Corning Tunnel Co. v. Pell*, 14 M. R. 612, 4 Colo. 507. This became the generally received interpretation of the act until the case of *Enterprise Co. v. Rico*

Aspen Co., 66 F. 200, 13 C. C. A. 390, affirmed by the National Supreme Court in 1897, 167 U. S. 108, 42 L. Ed. 96, 17 Sup. Ct. 762, 18 M. R. 661, followed by the case of *Campbell v. Ellet*, 167 U. S. 116, 42 L. Ed. 101, 17 Sup. Ct. 765, 18 M. R. 669, affirming *Ellet v. Campbell*, 18 Colo. 510, 511, 33 P. 521.

The Court holds that a tunnel duly located and its work diligently prosecuted has the right to all lodes not previously known to exist, on either side of the bore. That is to say, when a lode is reached the tunnel may elect to take 1500 feet in one direction or 1500 feet on the other side or may divide the length, so much on either side; that all locations on lodes not previously known, made within such area are voidable at the election of the owner of the tunnel.

Location and Record of Tunnel Site.

The following form has been drawn in attempted compliance with the Act of Congress, the Land Office regulations and the construction given to the act by the *Rico-Aspen case*.

It purports to claim its entire frontage of 3000 feet as its line of tunnel, and if the *Rico-Aspen case* stands in its entirety, the claimant is in position to assert his full rights under such form. But the *Rico-Aspen case* in principle can not be reconciled with *Erhardt v. Boaro*, 15 M. R. 472, 113 U. S. 527, 28 L. Ed. 1113, 5 Sup. Ct. 560. There the prospector by his notice had an inchoate right to his lode just discovered; such notice not specifying the extent of his claim, he was limited in his right of selection to 750 feet on each side of his point of discovery. This discord as to the two classes of claims still existing, we advise that it is safer for the tunnel claimant to elect at the outstart to take 750 feet on each side, or some other definite number of feet on each side, of the bore of his proposed tunnel.

LOCATION CERTIFICATE OF TUNNEL.

TO ALL WHOM THESE PRESENTS MAY CONCERN: Know ye, that I, *W. E. Renshaw*, a citizen of the United States, of *Idaho Springs*, County of *Clear Creek*, State of *Colorado*, do hereby declare and publish as a legal notice to all the world that I have a valid right to the occupancy, pos-

session and enjoyment of THE HALL TUNNEL AND TUNNEL SITE, located *January* 22nd, A. D. 1916, for the discovery of mines and the development of lodes, and situate in *Griffith* Mining District, *Clear Creek* County, State of Colorado, described as follows, to-wit:

Mouth of tunnel situate *on north slope of Leavenworth mountain; from the mouth of the tunnel, culvert under the middle track of the Georgetown, Breckenridge & Leadville Railroad bears N.* 17 *degrees* 38 *minutes W.* 32 *feet; corner No.* 6 *survey lot No.* 4614-B. *Lion mill site bears N.* 73 *degrees* 45 *minutes W.* 100.7 *feet; Woodchuck rock bears N.* 50 *degrees* 45 *minutes E.; Sherman mountain bears N.* 72 *degrees* 55 *minutes W.*

Size of tunnel 8 *feet wide by* 7 *feet high in the clear.*

Course of tunnel from its mouth *S.* 17 *degrees* 38 *minutes E.* 3,000 *feet to the south end of said tunnel, at which point is set a substantial stake, being the end stake, and between tunnel mouth and end stake the center line of the tunnel is marked at* 500 *feet,* 1,200 *feet,* 1,900 *feet and* 2,528 *feet from the mouth by marked stakes or blazed and marked trees. From the end stake Republican mountain bears N.* 40 *degrees W.; Saxon mountain bears N.* 39 *degrees* 40 *minutes E.; a stump* 9 *inches in diameter marked "B. T. & H. T." bears S.* 86 *degrees* 15 *minutes W.* 18.4 *feet; a tree* 5 *inches in diameter marked "H. T. & B. T." bears N.* 43 *degrees W.* 2 *feet; from said end stake, set a stake N.* 72 *degrees* 22 *minutes E.* 1,500 *feet; from said end stake set a stake S.* 72 *degrees* 22 *minutes W.* 1,500 *feet; from mouth of tunnel set a stake N.* 72 *degrees* 22 *minutes E.* 1,500 *feet; from mouth of tunnel set a stake S.* 72 *degrees* 22 *minutes W.* 1,500 *feet;* which last four mentioned stakes are at the exterior corners of the claim of said tunnel site.

And I claim for line of tunnel 1,500 feet on each side of the center of the bore or course of the tunnel, and the right to 1,500 feet on each and every lode which may be discovered in the due prosecution of said tunnel.(*)

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all rights granted to the locator as tunnel rights under the terms of section 2323 of the Revised Statutes of the United States.

Witness my hand and seal this 22nd day of *January,* A. D. 1916.

W. E. RENSHAW. [SEAL.]

STATE OF COLORADO, } ss.
City and County of *Denver.* }

Before me, the subscriber, a notary public in and for said county, personally appeared *W. E. Renshaw,* to me personally known to be the same person who executed the within declaration of occupation and acknowl-

edged that he signed, sealed and published the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal this 22nd day of *January*, A. D. 1916. *Alice Hatch*,

[SEAL.] Notary Public.

STATE OF COLORADO, } ss.
City and County of *Denver*. }

W. E. Renshaw, of the County of *Clear Creek*, State of Colorado, being first duly sworn according to law deposes and says: That he is a citizen of the United States over the age of 21 years; that he is the owner by pre-emption, location and occupation of the foregoing tunnel site, the said tunnel being prosecuted for the development of lodes belonging to said affiant; also for the discovery of other lodes; affiant further says that he has expended in actual work and improvements on said tunnel not less than forty thousand dollars, and that said tunnel has been already run the distance of 1,000 feet, and that it is *bona fide* his intention to prosecute work on said tunnel so located and described with reasonable diligence for the purposes therein set forth.

W. E. RENSHAW.

Subscribed and sworn to before me this 22nd day of *January*, A. D. 1916. *Duncan W. Miller*,

[SEAL] Notary Public.

Before recording place at the mouth of tunnel the

LOCATION NOTICE.

The Hall Tunnel and Tunnel Site, located this *January* 22nd, 1916, by *W. E. Renshaw*. Course S. 17 degrees 38 minutes E. 3,000 feet to end post, from which end post Republican mountain bears N. 40 degrees W., Saxon mountain bears N. 39 degrees 40 minutes E., stump 9 inches diameter marked "B. T. & H. T." bears S. 86 degrees 15 minutes W. 18.4 feet.

Height of tunnel 7 feet, width 8 feet.

I claim 1,500 feet on all lodes to be discovered in this tunnel and not previously known to exist, on either side of tunnel as staked on the ground.(†)

W. E. RENSHAW.

DUMP LOCATION.

If ground for a dump is claimed, add, in the location certificate after the (*):

I also claim a square tract of land 125 feet on each side of the mouth of tunnel and extending 250 feet immediately below the mouth of the tunnel, as staked upon the ground, for dumping purposes.

And to the notice after the (†) add:

Dump 250 feet square as staked.

The actual location, of course, consists in setting the stakes as called for in such notices, and in starting the tunnel in good faith.

Location of Lodes Cut in a Tunnel.

They should be staked and recorded exactly as in the case of lodes discovered at the surface, except that no discovery shaft is required—the discovery in the tunnel taking its place —and the location stake or notice should be set on the surface at a point midway between side lines and above the discovery in the tunnel. Such location notice, as well as the location certificate, should state the fact that the lode was discovered in the tunnel and the number of feet in from the mouth. In fixing the surface line, approximate calculations should be made for the dip. In *Ellet v. Campbell,* 18 Colo. 510, 33 P. 521, affirmed *Campbell v. Ellet,* 167 U. S. 116, 42 L. Ed. 101, 17 Sup. Ct. 765, 18 M. R. 669, it was held that the discovery need not be followed by location; but the Court conceded that it might be required before patent could be secured.

"A tunnel is not a mining claim although it has sometimes been inaccurately called one."—*Creede Co. v. Uinta Co.,* 196 U. S. 337, 49 L. Ed. 501, 25 Sup. Ct. 266. In that case it is expressly held that the tunnel is a means of exploration "in the hope of finding a mineral vein. When one is found he (the tunnel owner) is called upon to make a location of the ground containing that vein and thus creates a mining claim the protection of which may require adverse proceedings."

We never could conceive that, as might be inferred from the *Ellet case,* a discovery in a tunnel would hold indefinitely without defining the surface lines of the claim, and the ruling above cited from the *Creede case* by the National Supreme Court sets the matter at rest.

Under this decision as we understand it the discoverer by tunnel has no greater rights than one who finds the lode on

the surface and after discovery so made has no greater time than any other discoverer to fix the length, width and surface lines which he will choose to enclose and protect his discovery.

In *Brewster v. Shoemaker,* 28 Colo. 176, 89 Am. St. Rep. 188, 53 L. R. A. 793, 63 P. 309, 21 M. R. 155, the lode was cut 250 feet below the surface in an unrecorded cross-cut. The dip was calculated to the surface and discovery notice posted on the center line, referring to the discovery in the tunnel, and the claim was staked and recorded. *Held,* that the location was valid and that no proving up between surface and the tunnel was required. The case holds also that the fact that the tunnel had been driven across patented ground belonging to strangers was not a point which could be raised by third parties.

The Right to Penetrate Under Other Lands.

The trespass of a tunnel cutting through country rock across a claim at great depth is not of that class denominated as destructive or irreparable, but it opens a private back door to the miner's underground wealth, and it may be enjoined because its completion would ultimately ripen into an easement.—*Richards v. Dower,* 64 Cal. 62, 28 P. 113; or if it claims the right to take the ore.—*Stratton v. Gold Sov. Co.,* 1 Mills' Leg. Adv. 350.

Applying the theory that every surface claimant owns to the center of the earth, no man has a right to drive a tunnel underneath the property of another without his license or consent. Such right may exist by district rule *(Bliss v. Kingdom,* 46 Cal. 651, 15 M. R. 239), but without any specific rule tunnels were constantly driven across prior claims without much question, until the *Rico-Aspen* decision and its sweeping concessions to tunnel sites compelled miners in self-defense to check their encroachments. The decisions are uniform that in the absence of statute or district rule, a tunnel has no implied right or license to penetrate under prior patents or locations.—*Richards v. Dower,* 64 Cal. 62, 28 P. 113; *Dower v.*

Richards, 73 Cal. 477, 15 P. 105; *Amador Co. v. Dewitt,* 73 Cal. 482, 15 P. 74; *Calhoun Co. v. Ajax Co.,* 182 U. S. 499, 45 L. Ed. 1200, 21 Sup. Ct. 885.

A party has no right to tunnel through another's patented ground to cut a vein whose apex is within his own patented lines.—*St. Louis M. & M. Co. v. Montana Co.,* 113 F. 900, 51 C. C. A. 530, 64 L. R. A. 207, 22 M. R. 127.

The Colorado Tunnel Acts—Eminent Domain.

A Colorado Act of 1861 gave a discovery tunnel the "right of way through all lodes which may lie on its course." The Act of 1897 enlarged this permission, and further provided for right of inspection to the owner whose lode was cut, and placed the burden of proof on the question of lode identity on the tunnel. Both these acts, in *Cone v. Roxanna Co.* (HALLETT, J. MS.), were held void (1) as to tunnel crossing prior location, because no provision was made for compensation, and (2) because not within the terms of A. C. Sec. 2338, allowing the states to legislate concerning easements. This same point (2) was ruled in *Calhoun Co. v. Ajax Co.,* 27 Colo. 1, 83 Am. St. Rep. 17, 50 L. R. A. 209, 59 P. 607, 20 M. R. 192 (affirmed 182 U. S. 499, 509, 45 L. Ed. 1200, 21 Sup. Ct. 885), the case making no reference to the 1897 Act, but its tenor would be against the validity of the act as a license to penetrate either a prior or a later claim.

The Colorado Act of 1891 (R. S. Sec. 2461) giving tunnels the right to condemn a right of way was sustained in *Tanner v. Treasury Co.,* 35 Colo. 593, 4 L. R. A. (N. S.) 106, 83 P. 464, so there can be no doubt of the validity of the later and more specific Act of 1907 (R. S. Sec. 2435). The Idaho Act on the same subject was held valid in *Baillie v. Larson,* 138 F. 177.

By the Colorado Act of 1907 power is given to condemn a right of way to any tunnel company offering itself as a common carrier of ores. It must file with the County Recorder a map of its survey, allow inspection to owners of all veins

which it cuts, and transport their ore and waste at fixed charges.

Where the tunnel has already been driven through the claim, it seems that ejectment is the proper remedy, and not injunction.—*Creede Co. v. Uinta Co.*, HALLETT, J. MS.

Unrecorded Tunnels.

Any party running a tunnel would probably hold the tunnel itself (*i. e.*, the bore as far as actually run), without any record whatever.—8 L. O. 71. This is done every day in the case of cross-cuts, which are simply tunnels on a small scale. But to claim any rights for its line or otherwise under the Act of Congress it must be staked and recorded.

Of course, a lode discovered in a tunnel, after the lode has been duly located and recorded on the tunnel discovery, is as valid upon an unrecorded as upon a recorded tunnel, its title having by such independent location become a matter wholly apart from the tunnel location.

Failure to Work.

The right to blind lodes is conditioned upon prosecuting work with "reasonable diligence." In the *Enterprise Co. v. Rico-Aspen Co.*, 66 F. 200, 206, 13 C. C. A. 390, the Court intimates that this clause should receive a strict construction and that prompt and energetic prosecution of the work should be required.

Failure to work for six months deprives the tunnel site of its claim to blind lodes, but does not affect its right to continue its bore through claims in advance of it.—*Fissure Co. v. Old Susan Co.*, 22 Utah 438, 63 P. 587, 21 M. R. 125.

Abandonment.

A tunnel, like any other kind of possessory claim, may be abandoned; but neglect to work does not operate to effect an abandonment; such neglect only operates to deprive it of tunnel rights along its line. The fact that no labor has been

done for many years is evidence of abandonment, but not conclusive. As before stated (page 108) abandonment is a question of fact, and in the case of tunnels is wholly independent of the annual labor law.

Patent—Adverse Claim.

There is no provision for patenting a tunnel site. 42 L. D. 456. Nor does it need to protect itself by adverse against an application for patent on a survey across its line in advance of its breast. If such survey cover blind lodes not yet cut in the tunnel the tunnel rights to the same are saved under the ruling in the *Rico-Aspen case*. And as to its right to bore through such patented survey its easement is saved without necessity of adverse or suit under the authoritative decision in *Creede Co. v. Uinta Co., supra.*

A lode recorded on a tunnel discovery adverses of course on its own merits as a lode location, but its discovery would on proper facts relate back to the date of the location of the tunnel site.

But in 29 L. D. 235, a tunnel having adversed a lode application, the application was held stayed until the determination of the supporting suit; and the case suggests the necessity of an adverse claim to protect its dump ground, if surveyed in.

Annual Labor by Tunnel.

Sec. 1.—That section two thousand three hundred and twenty-four of the Revised Statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.—*Feb.* 11, 1875, 18 St. L. 315.

The annual labor of $100 on each claim may be performed under the above section by work done on a tunnel, cutting, or which is driven to cut, such claims.—5 L. O. 5; *Id.* 34; 17 L. D. 190.

To apply tunnel work it is no objection that the tunnel runs through vacant ground or crosses lodes belonging to others before it reaches a point where it would tend to develop the claim.—*Hain v. Mattes,* 34 Colo. 345, 83 P. 127.

Where not enough work has been done in a tunnel to protect all the claims in front of it, the company must in some manner show to which claims it intended the work to apply.—*Duncan v. Eagle Rock Co.,* 48 Colo. 569, 139 Am. St. Rep. 288, 111 P. 588.

The Patent Expenditures of $500 May Also Be Made on Such tunnel. 4 L. O. 67. A party may patent one lode on the line of his tunnel for each $500 of labor spent in driving the tunnel. 30 L. D. 510. All claims in a group must share equally in the expenditure on the tunnel. 35 L. D. 361; 36 L. D. 100. See p. 594.

Tunnels Over 3,000 Feet Long.

The A. C. expressly limits the claim of a tunnel site to lodes not known to exist "within three thousand feet from the face of such tunnel." Attempts have been made to evade this limitation by filing records of a second tunnel to begin at a point 3,000 feet in from the mouth of the tunnel projected from the surface; *i. e.,* to begin at the end of the first 3,000 feet, taking 3,000 feet more, and even third and fourth extensions have been so recorded.

We regard these locations as absolutely void. But we draw the distinction between the right of a tunnel to undiscovered lodes and its right to bore through the mountain. The former is granted by Act of Congress, is limited by its terms and can not be enlarged. The latter, the right to bore, is a mere easement, exercised under district rules before the act, and there is no limitation on the claim of a tunnel to drive itself through the public domain as far as its owners may desire to penetrate.

A tunnel in its record therefore, in our opinion, can claim a right of way to drive to any expressed number of feet, but it

can not claim the statutory tunnel right to blind lodes beyond the first 3,000 feet; and the location of a second tunnel from the breast of the first is an attempt by a self-serving act to take from the prospector's right in the ground beyond 3,000 feet, a valuable privilege, which the Act of Congress has given him.

Undecided Tunnel Questions.

There are two questions likely to occur in tunnel site cases, but we are not aware of any decision on either of them.

1. Is a tunnel site void where its mouth is on a prior subsisting claim, especially a patented claim, whether town site, mill site, lode or placer?

We believe that it would be so held by analogy to the doctrine of *Gwillim v. Donnellan*, cited on p. 41, where the loss of the discovery shaft was held to be the loss of the lode. A notice on private property where the prospector has no right to trespass is no notice at all.

2. Is an adit on a vein made a valid tunnel site by calling it such? In other words, can a man drive a drift on his vein and call it a tunnel? The word "tunnel" of itself implies that it is a cut across the country. Certainly a man could not cover such adit or drift by a lode location and claim it as a tunnel site also, and it seems apparent that he could not record it as a tunnel site at all.

TAXATION.

By the Colorado Revenue Act, R. S. Sec. 5575, mining claims are required to be listed by the name and number of survey lot, when patented or entered for patent.

Mines are divided into two classes—producing and non-producing. A gross output of $5,000 places the mine in the first class.

The owner of a producing mine must make a special return to the Assessor in detail as required by R. S. Secs. 5618, 5619 (amended by Act of 1915, page 399). These sections are construed in *Foster v. Hart M. Co.*, 52 Colo. 459, 122 P. 48; *Paxson v. Cresson Co.*, 56 Colo. 206, 139 P. 531, and *Tallon v. Vindicator Co.*, 59 Colo. 316, 149 P. 108.

Possessory Title Taxable.

The estate in unpatented mining claims is property subject to the right of taxation.—*Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313, 14 M. R. 183; *Seymour v. Fisher*, 16 Colo. 188, 27 P. 240; *Earhart v. Powers*, 17 Ariz. 55, 148 P. 286. And a tax deed conveys the locator's title.—*Elder v. Wood*, 208 U. S. 226, 52 L. Ed. 464, 28 Sup. Ct. 263. Notwithstanding the above declaration of taxable *status* the possessory title has not, as a rule, been assessed, though taxes have always been levied on the surface improvements when extensive.

Patented Claims, or Those Entered for Patent, Are, of Course, assessed and taxed as other classes of real estate. In Nevada, and other States, attempts attended with continued litigation have been made to tax the net output. Such tax, so plausible in theory, is unjust and grossly unequal after conceding the fact that absolutely equal taxation can not be realized upon any theory of assessment. See *Mercur Co. v. Spry*, 16 Utah 222, 52 P. 382, construing the Utah law of this character. Net proceeds of coal mines held taxable in Montana.—*Montana Co. v. Livingston*, 21 Mont. 59, 52 P. 780.

Special Instances.

A mine can not be sold for tax assessed against improvements not found on the mining ground.—*Knox v. Higby*, 76 Cal. 264, 18 P. 381.

Where surface and minerals are separately owned they may be separately taxed.—*Cons. Coal Co. v. Baker*, 135 Ill. 545, 12 L. R. A. 247, 26 N. E. 651; *Stuart v. Com.*, 94 Ky. 595,

23 S. W. 367; *Mound City Co. v. Goodspeed Co.,* 83 Kan. 136, 109 P. 1002; *Downman v. Texas,* 231 U. S. 353, 58 L. Ed. 264, 34 Sup. Ct. 62; *Forty-Fort C. Co. v. Kirkendall,* 233 F. 704.

The number of the survey lot, in Colorado, is an essential part of the description in a tax deed.—*Hammon v. Nix,* 104 F. 689, 44 C. C. A. 132; *contra, Seymour v. Deisher,* 33 Colo. 349, 80 P. 1038.

American Bauxite Co. v. Board of Equalization is a case which well illustrates the maxim that the power to tax is the power to confiscate. The local Assessor valued the land which had been bought for $500,000 at $47,000,000. The Court holds that the value of ores and cost of mining are items to be considered, but only to reach the determination of what is the market value of the mine. The assessment was cut down to a sum slightly in excess of the purchase price.—119 Ark. 362, 177 S. W. 1151.

Federal Taxes.

Net income of mining company, how determined. *Stratton's Ind. v. Howbert,* 207 F. 419, 231 U. S. 399, 58 L. Ed. 285, 34 Sup. Ct. 136; *Stanton v. Baltic M. Co.,* 240 U. S. 103, 60 L. Ed. —, 36 Sup. Ct. 278.

Royalties, when not taxable.—*Sargent Land Co. v. Von Baumbach,* 207 F. 423, 424. Royalties are not income.—*Von Baumbach v. Sargent Land Co.,* 219 F. 31, 134 C. C. A. 649. Long lease of mines is practically a sale of the ore.—*Id.*

LIENS, JUDGMENTS, MORTGAGES.

Liens—How Affected by Patent.

R. S. Sec. 2332.— * * * Nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent.—*Sec.* 13, *A. C. July* 9, 1870.

Patent, although relieving claims from adverse rights, does not relieve from liens already attached against the property. On the other hand, the patented title enures to the benefit of the lien holder.—*Butte Co. v. Frank*, 65 P. 1, 25 Mont. 344, 21 M. R. 368.

Judgments are liens for the period limited by statute in each State, usually six years, the time running either from the date of judgment or the date of filing the transcript in the Recorder's office.

The miners' possessory title is subject to sale under the lien of a judgment.—*Bradford v. Morrison*, 212 U. S. 389, 53 L. Ed. 564, 29 Sup. Ct. 349.

Mortgages and Trust Deeds.

A mortgage may be so drawn as to secure expenses of mining as well as the original debt.—*Charter Oak Co. v. Stephens*, 5 Utah 319, 15 P. 253. In exceptional instances a miner's lien has been held to cut out a prior mortgage.—*Atlantic Co. v. Ropes Co.*, 119 Mich. 260, 77 N. W. 938; *Galloway v. Blue Springs Co.*, (Tenn.) 37 S. W. 1016, but as a general rule the mortgage takes precedence of all debts incurred by the further working of the mine. The lien of neither mortgage, judgment nor attachment, prevents the operation of the mine without an injunction for the protection of the security—and such injunction will be granted only in exceptional instances.—*Vervalen v. Older*, 8 N. J. Eq. 98, 10 M. R. 540; *Chung Kee v. Davidson*, 102 Cal. 188, 36 P. 519. Such liens do not prevent the free severance and sale of the ore.—*Young v. Northern Illinois Co.*, 13 F. 806, 10 M. R. 596, 9 Biss. 300. The debtor can continue to mine after sheriff's sale, during the redemption period.—*Ward v. Carp River Co.*, 15 N. W. 889, 50 Mich. 522.

In *Macon v. Trowbridge*, 38 Colo. 330, 87 P. 1147, an action to foreclose a trust deed on a mine, defendant was allowed to offset damages for failure of the note holder to keep the covenants of a lease on the same mine.

When the mine was worked by a party who held a mortgage on it the mine's debts he incurs are not the debts of the mortgagor; and any net proceeds must be applied on the debt.—*Wadleigh v. Phelps,* 149 Cal. 627, 87 P. 93.

The Court has no right to allow receivers' certificates to issue to carry on mining and cut out a mortgage lien.—*International Tr. Co. v. Decker Bros.,* 152 F. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152; *Nowell v. International Tr. Co.,* 169 F. 497, 94 C. C. A. 589.

By Section 1 of the chapter of the R. S. entitled "Trust Deeds and Mortgages," trust deeds in Colorado must run to the "Public Trustee," otherwise they can be foreclosed only as mortgages. Whatever form is followed the statute allows nine months for redemption. The common law mortgage, both for security to the creditor and for fairness to the debtor, is to be preferred in all cases except in securing large bond issues where for reasons specially applying to the negotiation of the securities a trust company, or some personal trustee other than the public trustee, is usually nominated.

Partner's Lien.

A mining partner in certain cases seems to have a lien for his advances in excess of those of his co-partner.—*Duryea v. Burt,* 11 M. R. 395, 28 Cal. 569; *Beck v. O'Connor,* 21 Mont. 109, 53 P. 94, 19 M. R. 342; *Childers v. Neely,* 47 W. Va. 70, 81 Am. St. Rep. 777, 49 L. R. A. 468, 34 S. E. 828, 20 M. R. 222; *G. V. B. Co. v. First Nat. Bank,* 95 F. 35, 35 C. C. A. 510, 20 M. R. 66; *Greenlee v. Steelsmith,* 62 S. E. 459, 64 W. Va. 353; *Connolly v. Bouck,* 174 F. 312, 98 C. C. A. 184.

See MINERS' LIEN; EXAMINATION OF TITLE.

MINERS' LIEN.

To Whom Allowed by Colorado Act.

R. S. Sec. 4028.—The provisions of this act shall apply to all persons who shall do work or shall furnish materials or mining, milling or other machinery or other fixtures, as provided in Section 1 of this Act, for the working, preservation, prospecting or development of any mine, lode or mining claim or deposit yielding metals or minerals of any kind or for the working, preservation or development of any such mine, lode or deposit, in search of any such metals or minerals; and to all persons who shall do work upon or furnish materials, mining, milling and other machinery or other fixtures, as provided in Section 1 of this act, upon, in or for any shaft, tunnel, mill or tunnel site, incline, adit, drift or any draining or other improvement of or upon any such mine, lode, deposit or tunnel site; and to every miner or other person who shall do work upon or furnish any coal, power, provisions, timber, powder, rope, nails, candles, fuse, caps, rails, spikes, or iron, or other materials whatever, as provided in Section 1 of this act, upon any mine, lode, deposit, mill or tunnel site;

Several Claims Worked Together.

Provided, That when two or more lodes, mines or deposits owned or claimed by the same person or persons shall be worked through a common shaft, tunnel, incline, adit, drift or other excavation, then all the mines, mining claims, lodes, deposits and tunnel and mill sites so owned and worked or developed shall, for the purpose of this act, be deemed one mine;

No Lien Against Leased Claims.

And Provided Further, That this section shall not be deemed to apply to the owner or owners of any mine, lode, mining claim, deposit, mill or tunnel, where the work or labor shall have been performed for, or the materials furnished to, a lessee or lessees. Section 1 as herein referred to is Section 4025 of the Revised Statutes of Colorado, 1908.—*Act of* 1899, *p.* 266, *as amended* 1915, *p.* 332.

A further section gives a lien on water rights appurtenant. Sec. 4031. And on oil and gas wells. Sec. 4049.

Procedure to Enforce Lien.

A miner whose wages or contract money is in default, secures a lien by filing with the County Recorder a statement substantially as follows:

FORM OF LIEN STATEMENT.

KNOW ALL MEN BY THESE PRESENTS: That I, *Millard A. Pennington*, do hereby give notice of my intention to hold and claim a lien upon the *Thomas a'Kempis* Lode Mining Claim in *Ruby* Mining District, County of *Gunnison*, State of Colorado.

Said lien is claimed for work and labor done by me upon said lode (*or materials furnished by me to said lode for the working and development of the same and used therein*), as miner for days pay, at the special instance and request of *J. G. Edwards*, one of the owners or reputed owners of said lode, between the first day of July, A. D. 1915, and the 25th day of December, A. D. 1915, both dates inclusive, upon the following abstract of indebtedness:

Total amount of indebtedness	$742.00
Total amount of credits	441.00
Balance due claimant	$301.00

That the owners or reputed owners of said lode are *Alva Adams* and *J. G. Edwards*.

Witness my hand this *second* day of *January*, A. D. 1916.

MILLARD A. PENNINGTON,
Claimant.

STATE OF COLORADO, County of *Gunnison:* ss.

Before me, the subscriber, *Chas. E. Whitfield*, a Notary Public in and for said county, personally appeared *Millard A. Pennington*, who, being duly sworn, saith that the foregoing statement and abstract of indebtedness, and the matters and things therein set forth, are true to the best knowledge, information and belief of affiant.

MILLARD A. PENNINGTON.

Sworn and subscribed before me this *second* day of *January*, A. D. 1916.

Chas. E. Whitfield,
[SEAL.] Notary Public.

When the claimant is a sub-contractor or employed by a contractor, strike out

"J. G. Edwards, one of the owners or reputed owners of said lode," and insert

"at the special instance and request of *Thomas B. Crawford*, a contractor under the owners of said lode."

Sub-contractors must serve a copy of such statement on the owner or his agent, at or before the time of filing, but if neither the owner nor agent can be found in the county, an affidavit to that effect shall be filed in lieu of service.

The time to file varies from one to three months according to the class or nature of the claim.

Special provision is made in the act for instances where the names of the owners are unknown.

Group Claims.

Where mines are worked as a group the whole are considered as one mine for lien purposes.—*Tredinnick v. Red Cloud Co.*, 72 Cal. 78, 13 P. 152.

A laborer working in a quartz mill standing on the claim held to have a lien on the entire mine.—*Thompson v. Wise Boy Co.*, 9 Ida. 363, 74 P. 958. Lien for mill building extended to group of mines to operate which it was built.—*Salt Lake Co. v. Chainman Co.*, 137 F. 632.

In *Stearns-Roger Co. v. Aztec Co.*, 14 N. M. 300, 93 P. 706, the lien was extended to include a mill site used in operating the mine.

Six Months to Sue.

An action must be commenced to enforce the lien within six months after work completed or the lien is lost.

General Statutory Legislation.

Miners' or mechanics' liens are pure creations of statute, but are allowed by specific legislation in all the States. They uniformly prescribe some such statement or notice equivalent to the above form, but the statute of the particular State must be looked to for details.

Alaska.

A Special Lien Act for Alaska is A. C. 36, Stat. L. 848.

Ordinary placer mining is not "development" work and no lien lies for it.—*Pioneer Co. v. Delamotte,* 185 F. 752, 108 C. C. A. 90; *Andrews v. Ladd,* 188 F. 313, 110 C. C. A. 291; *Noble v. Gustafson,* 204 F. 69, 122 C. C. A. 383.

Decisions.

For rule of distribution where work has been performed on various parcels of group, see *Bassick Co. v. Schoolfield,* 10 Colo. 46, 14 P. 65; *Malone v. Big Flat Co.,* 76 Cal. 578, 18 P. 772. Lien allowed for pumping and stoping.—*Chappius v. Blankman,* 128 Cal. 362, 60 P. 925, 20 M. R. 461.

A party engaged in hauling ore from the mines to the quartz mill has no lien on the mine.—*Barnard v. McKenzie,* 4 Colo. 251, 9 M. R. 403. Watchman not entitled to.—*Williams v. Hawley,* 144 Cal. 97, 77 P. 762.

A mining foreman or superintendent has a lien.—*Palmer v. Uncas Co.,* 70 Cal. 614, 11 P. 666; *McLaren v. Byrnes,* 80 Mich. 275, 45 N. W. 143. See *Smallhouse v. Kentucky Co.,* 2 Mont. 443, 9 M. R. 388; *Rara Avis Co. v. Bouscher,* 9 Colo. 385, 12 P. 433; *Washburn v. Inter-Mountain Co.,* 56 Or. 578, Ann. Cas. 1912C, 357, 109 P. 382.

An agent in charge of an idle mine has no lien for his wages. —*Morrison v. New Haven Co.,* 55 S. E. 611, 143 N. C. 250.

In some States it is held that the lien can not be assigned until after it has been recorded.—*Loud v. Gold Ray Co.,* 72 Or. 155, 142 P. 785.

It would seem self-evident that there can be no lien on ore after it has been severed and become personal property, and so it has been decided as to severed oil.—*Black v. Giarth,* 88 Kan. 338, 128 P. 183.

A lien lies for electricity furnished for light or power.— *Grants Pass Co. v. Enterprise Co.,* 58 Or. 174, 34 L. R. A. (N. S.) 395, 113 P. 859.

Where the mine boards the men the cook is entitled to a lien for his wages.—*Cascaden v. Wimbish,* 161 F. 241, 88 C. C. A. 277.

Lien of Surveyor or Civil Engineer.

Whether R. S. Colo. Sec. 4045 giving such lien is still in force is matter of doubt, but in any event a surveyor seems to be allowed a lien under the terms of the general clauses of section 4025.

An expert has no lien for making a report on a mine.—*Lindemann v. Belden Co.,* 16 Colo. App. 342, 65 P. 403.

Mine Under Lease.

Until 1915 there were repeated legislative attempts in Colorado to bind the owners' title for work hired by the lessee, with provisos and requirements of notice that rendered the meaning uncertain and led to frequent litigation, but in that year the amendment to section 4028 set the matter at rest and denies any such lien.

In Nevada the lessor's title is bound unless he has posted notice.—*Lamb v. Goldfield Co.,* 37 Nev. 9, 138 P. 902.

Reynolds v. Norman is a case holding the owner responsible if he encouraged the lessee's employee to look to him for payment.—57 Colo. 339, 141 P. 466; *McClung v. Paradise Co.,* 164 Cal. 517, 129 P. 774.

Against Option Holder.

When a mine is worked under an option of sale the terms of such contracts vary so widely that no general rule can be safely stated as to when liability attaches against the fee simple title. On a lease containing covenants for special work with privilege of purchase the owner's estate has been held liable in *Eaman v. Bashford,* 4 Ariz. 199, 37 P. 24; *Hines v. Miller,* 122 Cal. 517, 55 P. 401, 19 M. R. 609; *Colorado I. Wks. v. Taylor,* 55 P. 942, 12 Colo. App. 451; *Pike v. Empfield,* 21

Colo. App. 161, 120 P. 1054; *Dahlman v. Thomas,* 88 Wash. 653, 153 P. 1065. To the contrary.—*Maher v. Shull,* 11 Colo. App. 322, 52 P. 1115; *Block v. Murray,* 12 Mont. 545, 31 P. 550; *Hadley Co. v. Cummings,* 7 Ariz. 258, 64 P. 443; *Reese v. Bald Mt. Co.,* 133 Cal. 285, 65 P. 578.

The employee of a licensee has no lien.—*Jurgenson v. Diller,* 114 Cal. 491, 55 Am. St. Rep. 83, 46 P. 610. Nor the employee of the claimant of a hostile title.—*Idaho Co. v. Winchell,* 6 Ida. 729, 96 Am. St. Rep. 290, 59 P. 533.

A lease with option to purchase does not create the relation of vendor and purchaser.—*Milwaukee Co. v. Tomkins-Cristy Co.,* 26 Colo. App. 155, 141 P. 527.

Miner hired by party holding possession under executory contract of purchase has no lien.—*Williams v. Hawley,* 144 Cal. 97, 77 P. 762. But the real owner may be estopped where he allows the option holder to assert title.—*Eastwood v. Standard Co.,* 11 Ida. 195, 81 P. 382.

Lien allowed on dredge built by option holder and extended to entire group of placer claims.—*Colorado Co. v. Stearns-Roger Co.,* 60 Colo. 412, 153 P. 765.

CONVEYANCE.

The ordinary printed forms of deeds are usually sufficient to convey mining claims, but owing to the common practice of employing conveyancers totally disconnected with the legal profession, few abstracts, when the deeds, as recorded at length, are examined from the memoranda on the abstract, can show an unbroken line of perfect conveyances.

A common imposition is to present a deed in the form of a warranty purporting to convey "all the *right, title* and *interest* of the party of the first part," which amounts to no more than a quit-claim; or to make the consideration of a warranty deed nominal, which has the same practical effect.

WARRANTY DEED ON PATENTED CLAIM.

THIS INDENTURE, made this *tenth* day of *January*, in the year of our Lord one thousand nine hundred and sixteen, between *Henry P. Lowe*, of the City and County of *Denver*, State of *Colorado*, party of the first part, and *Willis B. Herr* of *Seattle*, State of *Washington*, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of *ten thousand dollars*, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns:

All the following described real estate, situate in *Alhambra* Mining District, County of *Park*, State of *Colorado*, to-wit:

The Fickle Goddess Lode Mining Claim, known as Survey Lot No. 777, being 1,500 feet in length and 300 feet in width, situate on South Mountain.

Together with all and singular the mines, minerals, lodes and veins within the lines of said claim, and their dips and spurs and all dumps, plant, fixtures, improvements, rights, privileges and appurtenances thereunto in anywise belonging.

To have and to hold the lands, tenements and hereditaments hereby conveyed unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part, for himself, his heirs, executors and administrators, doth hereby covenant and agree with the said party of the second part, his heirs and assigns, that the said premises and every part thereof, are free and clear of and from any and all liens, incumbrances, trusts and taxes, and that he, the said party of the first part, his heirs, executors and administrators, unto the said party of the second part, his heirs and assigns, the said premises and every part thereof, against himself, his heirs and assigns, and every other person lawfully claiming or to claim the same or any part thereof, SHALL AND WILL WARRANT AND FOREVER DEFEND; *always saving and excepting the same provisos, reservations and limitations contained in the patent of the United States issued for said survey lot.*

In witness whereof the said party of the first part hath hereunto set his hand and seal. HENRY P. LOWE. [SEAL.]

STATE OF COLORADO, City and County of *Denver:* ss.

I, *Alice Hatch*, a Notary Public in and for said City and County, do hereby certify that *Henry P. Lowe*, who is personally known to me to be the same person described in and who executed the within indenture,

personally appeared before me this day and acknowledged that he signed, sealed and delivered the said indenture as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal this *tenth* day of *January*, A. D. 1916.

ALICE HATCH,
Notary Public.

[SEAL.]

My commission expires March 4, A. D. 1918.

The Date of Expiration of Commission Is Required to Be noted on all acknowledgments and affidavits taken before a notary public under Colorado Statute.—R. S. Sec. 4664. And many other States have the same requirement.

Warranty of Claim Entered for Patent.

Use the same form, inserting the words *"to be"* before "issued" and adding the words *"as entered in the Land Office"* after the words "said survey lot" in the saving clause of the warranty.

Warranty of Possessory Claim.

Use the same form as for "Patented Claims," omitting the words *"Survey Lot No.—,"* and omitting the clause in italics. Instead of such clause insert *"always saving and excepting the United States of America."*

Special Warranty.

When the grantor desires to warrant his own chain of title, but not against parties claiming under other locations, insert before the words "shall and will warrant," this clause:

"By, through or under the said party of the first part, or his grantors."

QUIT-CLAIM DEED.

THIS INDENTURE, made this *thirty-first* day of *January*, in the year of our Lord one thousand nine hundred and sixteen, between *Charles E. Skiles*, of the City and County of *Denver*, State of Colorado, party of the first part, and *Henry C. Beeler*, of the County of *Laramie*, State of *Wyoming*, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of *one thousand dollars*, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath remised, released and quit-claimed, and by these presents doth remise, release and quit-claim (sell and convey) unto the said party of the second part, his heirs and assigns:

All the following described real estate, situate in *The Consolidated Ten Mile* Mining District, County of *Summit*, State of *Colorado*, to-wit:

The EDELMIRA lode mining claim, *Survey Lot No.* 666, 1,500 feet in length and 150 feet in width, located on the west slope of *Sheep Mountain.*

Together with all and singular the lodes and veins within the lines of said claim, and the dips, spurs, mines, minerals, dumps, fixtures, improvements, rights, privileges and appurtenances thereunto in anywise belonging.

To have and to hold the lands, tenements and hereditaments hereby conveyed unto the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said party of the first part hath hereunto set his hand and seal. CHARLES E. SKILES. [SEAL.]

[Acknowledge as on page 332.]

A Quit-Claim Deed Is Commonly Used Where the Title Is possessory, and where the title is clear it passes the title as effectually as a warranty. But the grantee in a quit-claim may be chargeable with notice of equities not chargeable to a purchaser by a general or special warranty.—*Hannan v. Seidentopf*, 113 Iowa 658, 86 N. W. 44. Where the grantee knows that another is in adverse possession of what he is buying he is not an innocent purchaser.—*Wetzstein v. Largey*, 27 Mont. 212, 70 P. 717.

Mining Deeds.

There has come into use a form of deed called a mining deed, the blanks for which vary. They contain after the space left for description, the formula "together with the dips," etc., substantially as in the above forms. A deed to a mine does not differ from a deed to other real property in the same condition of title, except in the description, and the phrase "together

with," etc., which is really part of the description. Most of these deeds contain in their granting clause the operative words of a warranty in connection with the operative words of a quit-claim—"grant, bargain and sell," "remise, release and quit-claim."

But their legal effect is more that of a quit-claim than that of a warranty, except that the words "grant, bargain, sell and convey" have the special force of passing an after acquired title, and by legislation the word "grant" in some States is made to imply a warranty against incumbrances. In examining abstracts they will of course be considered as transferring the grantor's interest, but no lawyer or trained conveyancer would advise such deed, or any form of statutory deed where certain words are declared to have a certain talismanic charm, in preference to the known, fixed and understood grants and covenants of a common law warranty.

Short Form of Deed.

By Colorado Act of 1887 (Laws, p. 226) short forms of deeds were introduced.

"The implied warranty which the vendor in ignorance of its nature is made liable for by this statutory form, is totally inapplicable to mining claims whether patented or possessory. It would make the vendor liable, if liable for anything, for a fee simple title even to making good the exceptions on the face of the patent. If used in conveying a possessory claim there is a breach of the warranty the moment the instrument is delivered. What is conveyed by the so-called short form of quit-claim deed, it is impossible to say. The entire set of forms should be discarded."

The above paragraph is the language used about these statutory forms of deeds in the sixth edition of this book. We have never qualified it and only add that the act was repealed at the 1889 session.

Description.

The exact description of a located lode or placer is "The .....Lode Mining Claim" or "The.....Placer Mining

Claim." If patented add the words "Survey Lot No....." The number of the mineral entry is superfluous, and to describe the premises by metes and bounds is not good conveyancing, except, of course, when a fraction of a claim is conveyed. The name is usually a sufficient description.—*Smith v. Sherman Co.*, 12 Mont. 524, 31 P. 72; *Glacier Co. v. Willis*, 127 U. S. 471, 472, 32 L. Ed. 172, 8 Sup. Ct. 1214, 17 M. R. 127. The word "mine" is a dangerous term and to be avoided, as often an entire group of claims are known collectively by the name of one mine, and such entire group might pass, and, in fact, might be intended to pass by the use of such sweeping term.—*Smith v. Sherman Co.*, 12 Mont. 524, 31 P. 72; *Phillips v. Salmon R. Co.*, 9 Ida. 149, 72 P. 886. The word "lode" is commonly used as synonymous with lode mining claim.—*Buckeye Co. v. Carlson*, 16 Colo. App. 446, 66 P. 168, 21 M. R. 499.

A contract to convey a mining claim by name implies that vendor has a located claim and not a mere prospect.—*La Grande Co. v. Shaw*, 44 Or. 416, 72 P. 795, 74 P. 919.

Misdescribing a lode as a placer is immaterial where the balance of the description plainly indicates what was intended.—*Las Vegas Co. v. Summerfield*, 35 Nev. 229, 129 P. 303.

Unrecorded Claim.

An incomplete location may be transferred by parol and the record completed by the purchaser.—*Doe v. Waterloo Co.*, 70 F. 455, 456, 17 C. C. A. 190, 18 M. R. 265; *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 P. 1083, 74 P. 444. A prospect on the public domain may be the subject of lease or conveyance.—*Weed v. Snook*, 144 Cal. 439, 77 P. 1023.

Deed Subdividing Lode Claim—Dip.

Owing to the relation of the dip to the strike, when a line is drawn across a lode claim at right angles to the side at the surface, such line being intended for the division line between the part retained and the part sold, such line when carried

vertically downward may cut off the vein on its dip in such a way as to divide it in an unexpected manner. If, for instance, at the surface, it begins at the "west end of discovery shaft," it may leave the bottom of such shaft entirely on one fraction of the lode within a comparatively few feet of sinking. Such result or a similar result will invariably occur where the vein has a dip, unless the end lines are at an exact right angle to the strike of the vein.—See Plat, p. 217.

The deed of a mining claim with the ordinary verbiage does not convey lodes dipping underneath the side lines.—*Clark Montana Co. v. Butte Co.*, 233 F. 547, 548.

Apex Rights of Irregular Fraction.

Where the whole lode is conveyed there is no doubt that the deed carries the right to follow it on the dip to the full extent the grantor may have had such right. The same, if a certain number of feet off either end of the claim are conveyed, to the extent of feet granted.

But where a strip or irregular fraction of the claim is carved out and sold the question of the apex rights of such segregated parcel arises, and the tendency of the decisions is that the grantee has the right to follow on the dip whatever veins may apex on the ground. Of course such right would be limited by the end lines and planes projected from the end lines of the claim.

In *Stinchfield v. Gillis*, 96 Cal. 33, 30 P. 839, 17 M. R. 497, it was held that all veins apexing within the surface area are conveyed although carried by the dip into other land of the grantor.

In *Boston & M. Co. v. Montana Co.*, 89 F. 529, 19 M. R. 480, it was held that the grantee could follow on the projection of one of the lines of the pentagonal tract described, the same as if it were an end line in a patent. This gave to one party diverging, and to the other converging, end planes. The contention that each party was to follow as much of the vein as apexed within his own territory both governed by parallel end

line planes always seemed to us the more just, simple and reasonable rule to apply to this class of cases.

The rule contended for has been adopted by the Supreme Court of Montana, and the ruling in the Federal case disapproved.—*Montana Co. v. Boston Co.*, 27 Mont. 288, 70 P. 1114, 22 M. R. 471.

In settlement of disputed title between the Nine Hour and St. Louis lodes, the Montana Co. conveyed to the St. Louis Co. a strip of the disputed ground 30 feet wide by 400 feet in length. The deed conveyed the strip with the dips, spurs and angles and "all the mineral therein contained." Afterwards a vein not then known to exist was found to dip underneath this strip. The Federal Courts below allowed the grantor to work this vein underneath the strip, but the Supreme Court finally held that the words above quoted were a common law grant and covered the ore in this dipping vein between the vertical lines of the strip. And they further intimated that the grantor might have a right of way to get at its vein beyond the strip. —*Montana M. Co. v. St. Louis M. Co.*, 204 U. S. 204, 51 L. Ed. 444, 27 Sup. Ct. 254; overruling 102 F. 430, 42 C. C. A. 415, 20 M. R. 507 and *St. Louis M. Co. v. Montana M. Co.*, 104 F. 664, 44 C. C. A. 120, 56 L. R. A. 725, 21 M. R. 57.

Construction of deed conveying fraction of a claim with the holding that it estopped the grantor from following underneath its surface the vein of an outside lode on the dip. (It follows though without citing it, the construction given to the Nine Hour deed in *Montana M. Co. v. St. Louis M. Co.*, 204 U. S. 204, 51 L. Ed. 444, 27 Sup. Ct. 254.)—*Riley v. North Star Co.*, 152 Cal. 549, 93 P. 194, 195.

Cross Lodes.

The *Stinchfield v. Gillis case, supra,* as reported in 107 Cal. 84, 40 P. 98, 18 M. R. 195, holds that the grantor can not claim for his vein retained, any rights as a cross lode, without special reservation to that effect.

In *Bogart v. Amanda Co.* the Supreme Court of Colorado construed an agreement between overlapping claimants for a

deed of surface ground under its peculiar wording and the law of cross lodes as understood at that time to be not limited to the surface but to convey all veins except the cross lode mentioned in the contract.—74 P. 882, 32 Colo. 32.

Same Ground Covered by Conflicting Locations.

The owners of the Edna, after record, changed their stakes so as to produce a conflict with the Lightning. They then sold the Edna by the recorded description and afterwards bought the Lightning. *Held,* that they were estopped to set up the Lightning title against the ground in conflict.—*Shreve v. Copper Bell M. Co.,* 11 Mont. 309, 28 P. 315.

Where the same lode or ground is covered by more than one location owned by the same grantor his deed of one may be construed to convey the title under both locations.—*Weill v. Lucerne Co.,* 11 Nev. 200, 3 M. R. 372; *Phillpotts v. Blasdel,* 4 M. R. 341, 8 Nev. 61; *Lebanon Co. v. Consolidated Rep. Co.,* 6 Colo. 371, 372; *Shoshone Co. v. Rutter,* 87 F. 801, 31 C. C. A. 223, 19 M. R. 356. For construction of conveyance in general terms after portion of a survey lot had been segregated by judgment, see *Mollie Gibson Co. v. Thatcher,* 57 F. 865, 6 C. C. A. 621.

The locator of a lode claim afterwards secured a placer patent covering the same ground after he had conveyed a part of the lode location to third parties. *Held,* that his patent perfected title to his grantee for the ground conveyed.—*Collins v. McKay,* 36 Mont. 123, 122 Am. St. Rep. 334, 92 P. 295.

Deed Covenanting for Annual Labor.

In *McDougall v. O'Connell* an interest in three lode claims had been sold to the plaintiff with a proviso that the purchaser might demand back the purchase money at the end of three years, "he keeping up his share of the assessment work." He was allowed to recover notwithstanding his failure to comply with the condition and the defendant lost both his mine and

the price of it. There was a dissenting opinion, which dissenting opinion was emphatically the right of the case. 72 Wash. 349, 130 P. 562.

Severance of Mines and Surface Reservation.

Where minerals are specially granted or where surface is granted without the minerals, there should be special covenants for support of the soil and buildings or for right of entry to get at the minerals reserved, as the case may be; although in such cases those incidents are implied to the extent necessary to enjoy each severed estate. See p. 300.

FORM OF RESERVATION.

Insert after the clause "To have and to hold":

Always saving, excepting and reserving unto the said party of the first part, his heirs and assigns, all mines and minerals, lodes, veins and deposits found or to be found under or within the lines or area of the above granted premises, together with their dips, with such reasonable use of the surface ground as may be necessary to win, work and carry away said minerals so excepted and reserved.—Rogers, p. 880; Bainbridge, p. 480.

While the distinction between an exception and a reservation is well established the words are often used interchangeably. —*Moore v. Griffin*, 72 Kan. 164, 4 L. R. A. (N. S.) 477, 83 P. 395.

Witnesses.

No attesting witnesses are required to deed conveying land in Colorado or the other States or Territories of the Pacific slope excepting Utah and Wyoming, which require one attesting witness, and Alaska and Oregon, which require two. A deed signed with the grantor's mark must be always witnessed on general principles. A deed of a mining claim in Alaska not acknowledged and not having two witnesses is void.—*Alaska Ex. Co. v. Northern M. Co.*, 152 F. 145, 81 C. C. A. 363; *Waskey v. Chambers*, 224 U. S. 564, 56 L. Ed. 885, 32 Sup. Ct. 597, Ann. Cas. 1913D, 998. But the witnesses need

not be disinterested persons.—*Halla v. Cowden*, 170 F. 559, 95 C. C. A. 325.

Dower—Wife's Signature.

In all those States where the right of dower exists the wife must of course join in the husband's deed, in order to bar her right. These States (and the Eastern States generally) are Alaska, Montana, Oregon and Utah. In Arizona the wife must join in husband's deed except for unpatented mining claims.

The widow has no right of dower in a mining claim held by possessory title.—*Black v. Elkhorn Co.*, 163 U. S. 445, 41 L. Ed. 221, 16 Sup. Ct. 1101, 18 M. R. 375. Otherwise as to mines owned in fee.—*Whittaker v. Lindley*, 8 Ky. Law Rep. 690, 3 S. W. 9; *Stoughton v. Leigh*, 5 M. R. 47, 1 Taunt. 402.

Husband's Signature Necessary.

The husband is required to join in the wife's deed in Alaska. In California and Washington, in a conveyance of community property the husband must join in the wife's deed and the wife in the husband's deed. In all cases where both are required to join, it is assumed that a separate acknowledgment by the wife is required.

Corporate Deeds.

The presence of the corporate seal is *prima facie* proof that it is the deed of the corporation. A third party can not attack the validity of a corporate deed for non-compliance with the statutory requirements. Such requirements are for the protection of the stockholders.—*Galbraith v. Shasta Co.*, 143 Cal. 94, 76 P. 901.

Acknowledgments.

An acknowledgment before a notary public is customary and valid in any of the Pacific States or Alaska, though the land lies in one State and the acknowledgment is taken in another. Where the deed conveys land in another State a

commissioner of deeds for such State, if accessible, is always authorized to take the acknowledgment. When taken before this officer no certificate of his official character is required.

Other officers are named in the statutes of the several States, but a notary public within the State, a commissioner or notary without the State, and a consul in foreign countries are legalized to prove deeds by this form practically everywhere.

The acknowledgment is not a part of the deed proper but a statutory mode of providing proof of its execution and delivery. An unacknowledged deed may be good if there is extrinsic proof of those facts. Arizona is an exception to this rule and the acknowledgment in that State has been held to be an essential part of the deed.—*Lewis v. Herrera*, 208 U. S. 309, 52 L. Ed. 506, 28 Sup. Ct. 412.

For form of acknowledgment by an individual see page 332. The following are correct forms in the case of corporations and deeds executed under power of attorney:

ACKNOWLEDGMENT BY CORPORATION.

STATE OF COLORADO, } ss.
Hinsdale County. }

I, *William L. Siegmund, a Notary Public* in and for said County, do hereby certify that *Everett E. Ellinwood*, President of the *Coldstream* Mining Company, who is personally known to me to be such President, and the same person who as such President, subscribed the corporate name and caused the corporate seal of said Company to be affixed to the above Indenture, personally appeared before me this day and acknowledged the same to be the free and voluntary act and deed of the said corporation for the uses and purposes therein set forth.

Witness my hand and Notarial Seal this *third* day of *January*, A. D. 1915. *William L. Siegmund*,

[SEAL.] Notary Public.

My commission expires April 12, 1916.

ACKNOWLEDGMENT BY ATTORNEY IN FACT.

UNITED STATES OF AMERICA, DISTRICT OF COLORADO: ss.

I, *Charles W. Bishop*, Clerk of the Circuit Court of the United States in said District, do hereby certify that *Jean F. Webb*, Attorney in Fact, of the within named *George W. Gilson*, who is personally known to me to be such Attorney in Fact, and the same person within described as

such Attorney in Fact, and who affixed the name and seal of his said principal to the within Indenture, personally appeared before me this day and acknowledged the said Indenture to be his free and voluntary act and deed and the free and voluntary act and deed of the said *George W. Gibson* for the uses and purposes therein set forth.

Witness my hand and the Seal of said Court, this *third* day of *January*, A. D. 1915.

CHARLES W. BISHOP,
[SEAL.] Clerk of Court.

SALES AND OPTIONS.

Executory contracts for the sale of mines are of two distinct kinds—either binding both seller and buyer or binding only on the vendor to sell, the latter being the more usual, and commonly in the form of an option or title bond. Such option or title bond, to take it out of the class of contracts known as naked options or unilateral contracts, which have been uniformly held void for want of mutuality, should always show a consideration more than nominal; either a payment made or a binding promise to make a payment or to develop the property or to be at an expenditure in some form to offset the vendor's promise to convey the mine.

Naked title bonds are mere options, and therefore without consideration and revocable.—*Smith v. Reynolds,* 2 M. R. 227, 8 F. 696, 3 McCrary 157; *Finnerty v. Fritz,* 5 Colo. 174, 1 M. R. 437; *Gordon v. Darnell,* 2 M. R. 220, 5 Colo. 302; *Cortelyou v. Barnsdall,* 236 Ill. 138, 86 N. E. 200. But where the holder of the bond pays a part of the consideration or agrees to develop the property or in any other manner gives a valuable consideration the agreement is valid as a contract binding on the parties, and when recorded binds the property. —*Pennsylvania M. Co. v. Smith,* 56 Atl. 426, 207 Pa. 210.

An option without consideration may be recalled, and a commission promised to a party in case sale was made falls with the option.—*Mitchel v. Gray,* 8 Cal. App. 423, 97 P. 160.

The right of choice is what the option holder pays for. An option contract is necessarily non-mutual.—*Pittsburg Co. v. Bailey*, 90 P. 803, 76 Kan. 42, 12 L. R. A. (N. S.) 745.

A party has the right to agree to convey property to which he has at the time no title.—*Donovan v. Hanauer*, 32 Utah 317, 90 P. 569.

The parties made an agreement under which $500 was paid and $14,500 promised to be paid—construed as an absolute contract of sale, although styled in the wording of the contract an "option."—*Chenoweth v. Butterfield*, 11 Ariz. 315, 94 P. 1131.

When the option holder paid an installment and was placed in possession with the right to mine, viewed in connection with all the other facts, the option merged into an agreement for absolute purchase.—*Reed v. Hickey*, 13 Cal. App. 136, 109 P. 38.

Agreement construed as an executory contract and not a mere option.—*Pritchard v. McLeod*, 205 F. 24, 123 C. C. A. 332.

TITLE BOND.

KNOW ALL MEN BY THESE PRESENTS, That I, *Lawrence Lewis*, of the City and County of *Denver*, State of Colorado, *am* held and firmly bound unto *Frank A. Maxwell*, of the County of *Clear Creek*, in said State, in the penal sum of *forty thousand* dollars, to be paid to the said *Frank A. Maxwell*, his heirs, executors, administrators or assigns; to which payment, well and truly to be made, *I* do bind *myself*, *my* heirs, executors and administrators, and every of them, jointly and severally firmly by these presents.

Witness *my* hand and seal, this *fourth* day of *May*, in the year of our Lord one thousand nine hundred and sixteen.

WHEREAS, The above bounden obligor *hath* this day sold to the said *Frank A. Maxwell* certain real estate situate in *Battle Mountain* Mining District, County of *Eagle*, State of Colorado, to-wit: The *Legality* Lode Mining Claim, Survey Lot No. 99, containing 1,500 feet in length by 300 feet in width, on *Battle Mountain*.

Together with all and singular the lodes and veins within the lines of said claim (and not excepted on the official plat) and all mines, minerals, dumps, plant, fixtures, machinery, tramways, improvements, rights, privileges and appurtenances thereunto in anywise belonging.

For the sum of *twenty thousand* dollars to be paid to the said obligor, his executors, administrators or assigns, or deposited to his credit in the *First National Bank, Denver,* Colorado, on or before the *tenth* day of *May,* A. D. 1917, and for the further consideration that said obligee shall, before the said last mentioned date, expend the sum of at least *one thousand* dollars in the actual underground development of said property.

NOW, THEREFORE, the condition of the above obligation is such that if the above bounden obligor, *his* heirs or assigns, on payment or deposit of the said sum of *twenty thousand* dollars in manner aforesaid, and expressly within the time limited as aforesaid, time being of the essence of this contract, as to such payment or deposit, shall make, execute, acknowledge and deliver at *his* own cost and charges, good and sufficient deed or deeds of *general warranty* to the said *Frank A. Maxwell,* his heirs and assigns, or to such person, persons or company as *he* shall nominate, conveying said premises with good and perfect title, free from encumbrance, then this obligation to be void, otherwise to remain in full force and virtue.

LAWRENCE LEWIS. [SEAL.]

In consideration of the option expressed in this obligation, I agree to expend the sum of $1,000 therein mentioned in the actual underground development of the above described property within three months from the date of this Bond.

Witness my hand and seal this *fourth* day of *May,* A. D. 1916.

FRANK A. MAXWELL. [SEAL.]

Where one of several parties executes a mining agreement on behalf of all, with their knowledge, they may (in instances) be held without signing.—*Rice v. Ege,* 16 M. R. 179, 42 F. 661.

Time Is of the Essence of the Contract in a Title Bond on a mine.—*Presidio Co. v. Bullis,* 68 Tex. 581, 4 S. W. 860; *Merk v. Bowery Co.,* 31 Mont. 298, 78 P. 519. Or in suit for specific performance.—*Snider v. Yarbrough,* (Mont.) 115 P. 411; *Durant v. Comegys,* 3 Ida. 204, 28 P. 425. And in mining contracts generally.—*Waterman v. Banks,* 144 U. S. 394, 36 L. Ed. 479, 12 Sup. Ct. 646. It may be made so either from the nature of the subject matter or the contract of the parties. —*Settle v. Winters,* 2 Ida. 215, 10 P. 216; *Champion Co. v. Champion Mines,* 164 Cal. 205, 128 P. 315.

The doctrine of laches is peculiarly applicable to mining claims.—*Gamble v. Hanchett,* 34 Nev. 351, 126 P. 111. Time is of the essence of any contract in the purchase of an undeveloped mine.—*Gaines v. Chew,* 167 F. 630.

But it may be waived verbally or by allowing the vendee to work on assurances of extension.—*Mason v. Sieglitz,* 22 Colo. 320, 44 P. 588; *Presidio Co. v. Bullis, supra.* And delay may be explained even in a specific performance case.—*Hosmer v. Wyoming Co.,* 129 F. 884, 65 C. C. A. 81.

Strict performance may be waived and tender of deed not necessary when vendor has refused to perform.—*Bennie v. Becker Co.,* 17 Ariz. 198, 149 P. 749.

Time, though made the essence of the contract, may be waived or relieved against in equity upon proper facts.—*Wheeling Co. v. Elder,* 46 S. E. 357, 54 W. Va. 335.

An option must be exercised within the time limit—even *vis major* does not excuse.—*Jennings Oil Synd. v. Houssiere Co.,* 119 La. 793, 44 So. 481.

Executory contract of sale set aside for vendee letting mine get into debt.—*Barandun v. Barandun M. Co.,* 171 Cal. 250, 156 P. 473.

Laches in Fraud Cases.

The right to rescind must be exercised at once upon discovery of the fraud. Buyers of a mine can not after such alleged discovery work the property and thereafter elect to rescind.—*Richardson v. Lowe,* 149 F. 625, 79 C. C. A. 317; *Old Colony Co. v. Carrick,* 153 F. 173, 82 C. C. A. 347. The absence of prompt action to rescind is an election to affirm. —*Steinbeck v. Bon Homme M. Co.,* 152 F. 333, 81 C. C. A. 441.

The parties will not be allowed to stand by and await the result of the adventure before suit.—*Blen v. Bear River Co.,* 3 M. R. 435, 20 Cal. 602, 81 Am. Dec. 132.

Delay without sufficient excuse bars the remedy.—*Great West Co. v. Woodmas Co.,* 14 Colo. 90, 23 P. 908; *Jewell v. Trilby Mines,* 229 F. 298.

Where the bill is not on its face barred by the statute of limitations the defense of laches must be pleaded.—*Allen v. Blanche M. Co.*, 102 P. 1072, 46 Colo. 199. The decisions on this point are by no means uniform but this case gives a safe rule for the pleader to follow. See *Hall v. Nash*, 81 P. 249, 33 Colo. 500.

When with full knowledge of the alleged fraud a party acquiesces in the purchase for a considerable period it is a waiver of the defense.—*Turk v. Rudman*, 42 Mont. 1, 111 P. 739.

Extensions, Renewals.

The weight of authority is that where not in contravention of the terms of any statute a verbal promise to extend time is valid; and a promise to do the annual labor on the claims is a good consideration for such an extension.—*Stamey v. Hemple*, 173 F. 61, 97 C. C. A. 379.

A supplemental contract based on changed conditions does not need an express consideration.—*Russell v. Lambert*, 14 Ida. 284, L. R. A. 1915B, 20, 94 P. 54.

Where two together entered into a contract to secure a mine, each to bear his share of the advance payments, and one refuses to contribute, the other may rightfully secure a further option in his own name without liability to account to his associate. —*Gaines v. Chew*, 167 F. 630.

Commissions.

When the office of the agent is merely to bring the parties together and he does not negotiate the sale he is not estopped to receive pay from both parties.—*McLure v. Luke*, 154 F. 647, 24 L. R. A. (N. S.) 659, 84 C. C. A. 1.

Where the agent of the seller agrees with the agent of the buyer to pool their commissions it is a contract to take pay from both sides and the agent of the seller can not recover against his principal.—*Corder v. O'Neill*, 207 Mo. 632, 106 S. W. 10.

Where a mining company consummate a sale secured by a broker it can not accept the benefit of his agency and refuse to pay a commission, on the ground that its officer conducting the negotiations had not reported the contract. Such neglect of such officer is chargeable to the company.—*Dillard v. Ollalla* M. Co., 52 Or. 126, 94 P. 966.

A broker is entitled to a pro-rata on the price paid when the original price asked has been reduced.—*Lawson v. Black Diamond Co.*, 53 Wash. 614, 102 P. 759; *Glade v. Eastern Ill. Co.*, 107 S. W. 1002, 129 Mo. App. 443.

Disputing Vendor's Title.

The rule that a vendee can not dispute his vendor's title does not apply when the vendee claims that he was induced into the contract by fraud.—*Phoenix v. Bijelich*, 95 P. 351, 30 Nev. 257.

Where a purchaser is put in possession under an executory contract of sale and while in possession buys in a hostile title to an undivided interest, he holds such title in trust for his vendor. He can not remain in possession and decline payment and at most (if this hostile title was the better title), he can only claim credit for the price paid with interest.—*Garvey v. La Shells*, 151 Cal. 526, 91 P. 498.

Defect of title to extent of undivided 1/48 no defense to vendee.—*Brown v. Gordon Tiger Co.*, 44 Colo. 311, 97 P. 1042.

Default After Part Payment.

The forfeiture of part payment as liquidated damages has been generally upheld.—*Clark v. American Co.*, 28 Mont. 468, 72 P. 978; *Garcin v. Pennsylvania Co.*, 71 N. E. 793, 186 Mass. 405; *Spedden v. Sykes*, — Wash. —, 98 P. 752; *Champion Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315.

WORKING CONTRACT SALE.

For and in consideration of the sum of $500 to me in hand paid by *Orrin F. Place*, the receipt whereof is hereby acknowledged, I, *Charles H. Morris*, do hereby agree to place said *Orrin F. Place* in full and sole

possession and control of the *Fair Deceiver* Lode Mining Claim, situate, etc., with authority to work and prospect the same as he sees fit for the term of *sixty days* from date, provided only, that such work be done in good and workmanlike manner, and that any ore taken out shall be separated and left on the dump, and not removed during the lifetime of this contract. And at any time within said period, on tender to me of the further sum of $4,500, I agree to deliver a good and sufficient warranty deed to the said *Orrin F. Place,* his heirs and assigns, conveying said above described premises absolutely and clear of encumbrance.

In case no such tender is made, said sum of $500 is to be treated as the consideration of this option and right of testing and to be and remain my property as liquidated damages.

In case my title is found defective and I fail to make it good and marketable within said period, I agree to pay said *Orrin F. Place* the cost of abstract and the vendee's attorney's reasonable charges for examination of title, and to refund said sum of $500, and to repay to him all his expenditures upon the property.

The ore taken out during said period is to be the property of the party who remains or becomes the owner at the end of said period of sixty days.

Time is of the essence of this contract in all particulars.

Witness my hand and seal this *tenth* day of *May,* A. D. 1916.

CHARLES H. MORRIS. [SEAL.]

In consideration of the delivery to me of the above option, I agree to expend at least $500 in work upon the above described property within the lifetime of said option.

Witness my hand and seal the date above written.

ORRIN F. PLACE. [SEAL.]

A vendor can not re-enter and at the same time collect the purchase money notes. He can not have both remedies.—*Manson v. Dayton,* 153 F. 258.

SALE SUBJECT TO EXAMINATION OF TITLE.

The undersigned, *O. K. Gaymon,* of *Breckenridge,* State of Colorado, hath agreed to sell to *Frank M. Taylor,* of *Denver,* in said State, and said *Frank M. Taylor* hath agreed to buy of and from said *O. K. Gaymon* the *Corinne Rowland* Lode Mining Claim, situate in *Gregory* Mining District, *Gilpin* County, Colorado, for the consideration of $18,000 to be paid within *six months* from date, fee simple (or good possessory) title to be delivered and warranted clear of liens. Title subject to approval of *J. W. B. Smith,* attorney for purchaser. Cost of deeds to be paid by vendor; of examination of title by purchaser. Vendor to deliver

at his own cost certified abstracts of title within ten days to said attorney. Deeds to pass on tender of the sum above mentioned within the period of six months above limited.

If no tender is made within such period the purchaser shall be in default unless he show the title materially defective, or a prior breach of contract by vendor, or that material misrepresentations as to the mine or mineral have been made to him by the vendor or by parties in the interest of the vendor, and thereupon either party may proceed for specific performance or for damages or both or otherwise as he may be advised.

Witness the hands and seals of said parties this 24th day of *April*, A. D. 1916.

O. K. GAYMON. [SEAL.]
FRANK M. TAYLOR. [SEAL.]

The right to examine the abstract of title before payment is a condition precedent in the nature of things.—*Pennsylvania Co. v. Thomas*, 204 Pa. 325, 54 Atl. 101.

CONTRACT TO SELL AND TO BUY.

I, *William N. Vaile*, vendor, hereby agree to sell to *Charles S. Thomas*, and I, *Charles S. Thomas*, purchaser, agree to buy of said *William N. Vaile*, the *Dream* Placer Mining Claim, situate, etc.

The agreed consideration of said sale is $1,000 cash in hand paid, the receipt whereof is hereby acknowledged; $3,000 to be paid within *sixty days* from the date hereof, and $6,000 within ninety days from such date, making a total consideration of $10,000.

Said vendor within ten days from date will deliver to purchaser, or his attorney, an abstract of title duly certified by the clerk and recorder of said county, or by some reputable abstract office, together with all the original title papers which are in his possession or within his power to produce.

And within said time will place in escrow in the *National Bank of Commerce, Denver*, a good and sufficient warranty deed conveying to said *Charles S. Thomas*, or such person as he shall nominate, the said premises clear of encumbrance, to be by such bank held in escrow until final payment be made under this contract or default is made under the same. Deposit in said bank to the credit of vendor shall be equivalent to payment of any of said installments.

Time is of the essence of this contract as to each and every installment, and if any installment or installments be not paid within the time or times hereby limited therefor, all previous installments shall be and remain the property of said vendor, the deed in escrow shall be returned to him for cancellation, and the property shall remain his own, unaffected and unencumbered by this contract. But if he fail to deliver abstract within said period, or to deposit said deed in escrow, or if his title prove

encumbered or otherwise not marketable, vendee may recover any and all installments paid, or may sue for specific performance and for a perfect title, or for damages or otherwise as he may be advised.

Witness the hands and seals of said parties this *tenth* day of *May*, A. D. 1916.

WILLIAM N. VAILE. [SEAL.]
CHARLES S. THOMAS. [SEAL.]

A better because a fairer contract than the last above given, is a sale by deed, securing the unpaid installments by note and mortgage.

The terms of sale are so variant and the temptations to evade become so great with the fluctuations in value, that it is always preferable to state the bargain fully to an attorney jointly agreed on and whose compensation is not made contingent on the sale, and to have him place the bargain in such form as will express, without fiction or verbiage, the real intention of the parties.

Lease and Option.

Perhaps the most usual and in most instances the preferable form of executory sale is that of Lease and Option.

After end of paragraph No. 11 in the form of lease on p. 360 proceed as follows:

THE OPTION.

And in consideration of the acceptance of the foregoing lease and the expenditures to be made thereunder and the well and faithful keeping of the covenants thereof, the said lessee shall have the right to purchase the said demised premises by payment of the sum of *ten thousand* dollars on or before the *first* day of *May*, A. D. 1916, time being of the essence of the contract as to such payment. And upon the tender of such payment the lessor will make, execute, acknowledge and deliver at his own cost and charges, good and sufficient deed or deeds of *warranty* to be delivered to the lessee or such person or company as he shall nominate, conveying the said premises clear of incumbrance.

The forfeiture, surrender or termination of the above lease for any cause shall render this option void, and the above mentioned payment may not thereafter be tendered.

In the above form the covenants of the lease make a valid consideration for the option. In the absence of a clause defeat-

ing the option on forfeiture of the lease the option may be enforced, although the lease has been forfeited.—*Mathews Co. v. New Empire Co.*, 122 F. 972.

An agreement to work a mine is good consideration for a promise to sell it.—*Clarno v. Grayson*, 30 Or. 111, 46 P. 426. It follows that the acceptance of a working lease is good consideration for an option on the same property, and the combination of the two contracts in the same or by distinct papers is of common occurrence. See Form, page 351.

Escrow.

Where a title bond or other executory contract is delivered it is usually accompanied by a deed executed and acknowledged and placed in *escrow*. An escrow amounts to a deposit with a third party of an unrecorded deed to be delivered on certain conditions, the title bond or other executory contract being actually delivered and held in the meantime. Such escrow is usually in the shape of a deed enclosed in a sealed envelope and endorsed as follows:

To Wm. B. Morrison, Cashier, National Bank of Commerce, *Denver:* You are authorized to deliver the within deed to *Clarence A. Wood*, his agent, or order, upon payment to me, or deposit to my order, of the sum of *ten thousand* dollars, on or before the *first* day of *January*, A. D. 1916. Meanwhile you will hold the same irrevocably. If payment is not made on or before said date, you will return the same to me for cancellation. Luther M. Goddard.

Sept. 30, 1915.

An escrow is often placed on deposit with no paper other than its accompanying letter of instructions. And the agreement is often delivered on condition of its not going on record, the vendor objecting to clouding the title by recording executory agreements which will perhaps never result in conveyance. Such an escrow or agreement (not recorded) if on good consideration, is valid in all respects, except that of giving the purchaser record security.—*Wolcott v. Johns*, 7 Colo. App. 361, 44 P. 675.

The deed relates back to the date of the escrow agreement as to all who had notice of the escrow.—*Whitmer v. Schenk,* 83 P. 775, 11 Ida. 702.

Notice of withdrawal to the escrow holder is no notice to the buyer, nor is record of deed to a third party having knowledge of the escrow notice in such case.—*Smith v. Russell,* 20 Colo. App. 554, 80 P. 474.

Where an escrow deed is lifted it cuts out the equities of parties buying into the mine with notice of the escrow; but where such a third party bought the land, pending the escrow, it did not excuse the escrow grantee from tendering the money for the deed.—*Whitmer v. Schenk,* 11 Ida. 702, 83 P. 775.

After tender of performance by the vendee, an option becomes a contract which may be specifically enforced. And the vendor is estopped to prove the consideration was not paid as against a *bona fide* assignee.—*Hoogendorn v. Daniel,* 178 F. 765, 102 C. C. A. 213.

There must be performance of the conditions of the escrow or good legal excuse for non-performance.—*World's Fair Co. v. Powers,* 224 U. S. 173, 56 L. Ed. 717, 32 Sup. Ct. 453.

Acknowledgments to Contracts.

No instrument needs acknowledgment except such as is intended to be placed of record; if an instrument is recorded without acknowledgment, it may be valid as notice, but the original must be produced or accounted for when used in evidence—a certified copy is not evidence. An acknowledgment is not a part of the instrument, but supplies a mode of proving its execution without witnesses and for obtaining a valid copy when lost or mislaid.

Specific Performance.

When the contract, in whatever form, is based on sufficient consideration and is definite in its terms and not unilateral, and the vendee has not been guilty of laches, and has paid or performed or offered to pay or perform all that is required

of him, and the remedy at law by suit for damages is *inadequate*, specific performance of a contract for the sale or leasing of a mine may be enforced the same as a contract for the sale of any other class of real property.—*Zelleken v. Lynch*, 80 Kan. 746, 46 L. R. A. (N. S.) 659, 104 P. 563; *Hexter v. Pearce*, L. R. 1 Ch. 341 (1900); *Maryland Clay Co. v. Simpers*, 53 Atl. 424, 96 Md. 1; *McClurg v. Crawford*, 209 F. 340, 126 C. C. A. 266.

In an option for sale of a mine time is of the essence of the contract and tender must be made before the right to specific performance arises.—*Wheeling Co. v. Elder*, 170 F. 215.

Specific performance will not be denied, because a survey shows that there was much more mineral than the vendor had estimated, where the vendor had full opportunity to know what he was selling.—*Bradley v. Heyward*, 164 F. 107; *Heyward v. Bradley*, 179 F. 325, 102 C. C. A. 509. Refused where consideration not adequate.—*Hobbs v. Davis*, 168 Cal. 556, 143 P. 733.

Specific performance of contract for sale of stock will be granted only in exceptional cases which are stated in *Eckley v. Daniel*, 193 F. 279.

The Courts of one state will not decree specific performance of an agreement for an oil lease in another State.—*Wilhite v. Skelton*, 5 Ind. Ter. 621, 82 S. W. 932. On the other hand, it has been ruled that a suit to enforce a pipe line contract may be entertained by any court of general jurisdiction which secures service on the person.—*Texas Co. v. Central Fuel Oil Co.*, 194 F. 1, 114 C. C. A. 21.

Armstrong v. Maryland Coal Co. is a full case upon many of the points likely to arise in suit against vendor for specific performance. It also specifies the covenants which a buyer can not insist upon in demanding deed of coal lands.—67 W. Va. 589, 69 S. E. 195.

Where a legal promise of a lease has been violated the intended lessee may waive his right to specific performance and sue for damages.—*Rains v. Schermerhorn*, 86 Kan. 854, 122 P. 883, 87 Kan. 801, 126 P. 1085.

FRAUD.

The general rule is that a contract or document procured by fraud is not void, but only voidable at the suit of the party injured.—*McKnight v. El Paso Co.*, 16 N. M. 721, Ann. Cas. 1912D, 1309, 120 P. 694.

Where a sale has been induced by fraud the injured party may either rescind or sue for damages.—*Byard v. Holmes*, 33 N. J. L. 119, 6 M. R. 598; *Smith v. Bolles*, 16 M. R. 159, 132 U. S. 125, 33 L. Ed. 279, 10 Sup. Ct. 39.

If he do neither, but continue to exercise acts of ownership over the property purchased, he may be estopped even to plead the false representations to an action on the contract.—*Butler v. Rockwell*, 14 Colo. 125, 126, 23 P. 462; *Gordon Tiger Co. v. Brown*, 56 Colo. 301, 138 P. 51.

Proof is admissible that defendant had attempted to salt the same mine on other persons.—*Mudsill Co. v. Watrous*, 61 F. 163, 9 C. C. A. 415, 18 M. R. 1. Sale of worthless stock may be set aside on like principles as the sale of the mine.—*Ormsby v. Budd*, 72 Iowa 80, 33 N. W. 457. False representations made by officer are not necessarily chargeable to the company.—*Watson Co. v. James*, 72 Iowa 184, 33 N. W. 622. A party is bound where he assumes to know and makes assertions accordingly.—*Lehigh Co. v. Bamford*, 150 U. S. 665, 37 L. Ed. 1215, 14 Sup. Ct. 219; *King v. Lamborn*, 186 F. 21, 108 C. C. A. 123.

A party can not cover up a fraud by using his wife's name.—*Largey v. Bartlett*, 18 Mont. 265, 44 P. 962.

The right to set aside a sale for fraud does not survive against executors.—*Stratton's Ind. v. Dines*, 126 F. 968, 135 F. 449, 68 C. C. A. 161. Where an agent buys a mine for less than he reports to his principal he is liable for the difference to his principal *in assumpsit.*—*Humbird v. Davis*, 59 Atl. 1082, 210 Pa. 311.

And between associates none can secure a secret profit on the sale. Recovery in such case does not depend on proof of actual fraud.—*Sun Dance Co. v. Frost*, 7 Ariz. 289, 64 P. 435,

21 M. R. 252; *Upton v. Weisling,* 8 Ariz. 298, 71 P. 917, 22 M. R. 601; *Christy v. Campbell,* 36 Colo. 261, 87 P. 548; *Dreeland v. Pascoe,* 102 P. 331, 39 Mont. 290.

A purchaser is not chargeable with notice of his vendor's fraud in his original purchase.—*Kendrick v. Colyar,* 143 Ala. 597, 42 So. 110. A party who by his own conduct prevents the completion of an act of appropriation can take no advantage of his own wrong.—*De Wolfskill v. Smith,* 5 Cal. App 175, 89 P. 1001.

An agent employed to buy a mine for $150,000 got it for much less than he reported to his principal. A judgment for the amount of his secret rebate was upheld, and the fact that plaintiff consummated the purchase was no bar to his action for damages.—*Great Western Co. v. Chambers,* 155 Cal. 364, 101 P. 6.

Where parties to a mining sale collude to deceive a purchaser, both the party who takes title and the party for whom he holds it and the property itself become liable and charged with a constructive trust.—*Cunningham v. Pettigrew,* 169 F. 335, 94 C. C. A. 457.

Pretending to become himself a purchaser of mining stock and giving check to pay for same and so inducing defendant to purchase also when the check was only a blind and was returned to the maker, *Held,* good to rescind the sale.—*Seaver v. Snider,* 21 Colo. App. 431, 122 P. 402. Fake check and salted samples.—*Springhetti v. Hahnewald,* 54 Colo. 383, 131 P. 266.

Purchaser of stock sued her broker for stock purchased on extravagant representations and alleged guarantee. Evidence and measure of damages in such case stated.—*Bullock v. Lewis,* 22 Colo. App. 449, 125 P. 849.

Distinction Between Opinions and Facts.

Assertions of value are as a rule only expressions of opinions. But otherwise as to statements that the lands sold include a certain ore bed.—*Chatham Co. v. Moffatt,* 16 M. R. 103, 147 Mass. 403, 9 Am. St. Rep. 727, 18 N. E. 168. And

opinions and promises (false averments of large means and extensive operations intended) may amount to actual fraud.—*Rorer Co. v. Trout,* 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713. The same as to promises never intended to be performed.—*Lawrence v. Gayetty,* 78 Cal. 126, 12 Am. St. Rep. 29, 20 P. 382, 17 M. R. 169.

The false representation of the amount of mineral in place, and as well the false representation that an expert had reported 50,000 tons in place when he had only reported 5000 tons, are material to set aside a sale.—*Johnson v. Withers,* 98 P. 42, 9 Cal. App. 52.

A statement that certain mining stock was of great value and would pay immense dividends is only expression of opinion.—*Wegerer v. Jordan,* 10 Cal. App. 362, 101 P. 1066. But overstating purchase price may be fraud.—*Rich v. Teasley,* 194 F. 534.

Representations Not Relied On.

Where a party buys a mine after examination, or after full opportunity to examine, or where he has tested and prospected a claim, or buys upon the report of his own expert, false representations, as a general rule, become immaterial.—*Fidelity Co. v. Bank,* 139 F. 101, 71 C. C. A. 299; *Winter v. Bostwick,* 172 F. 285; *Mitchell M. Co. v. Hammons,* 12 Ariz. 300, 100 P. 795; *Dooley v. Burlington Co.,* 12 Ariz. 332, 100 P. 797; *Ernest v. McCauley,* 155 Cal. 739, 102 P. 924; *King v. Lamborn,* 186 F. 21, 108 C. C. A. 123.

MINING LEASE.

Written or Verbal.

The lease if for more than one year must be in writing to avoid the Statute of Frauds. (R. S. Sec. 2662.) If for a less period it is still often reduced to writing, and the covenants being peculiar can not be too particularly expressed. The actual possession taken by the lessee being notice of his rights, the lease generally is neither acknowledged nor recorded.

Under an ordinary surface lease at a fixed rent the tenant has no right to sink an oil well.—*Isom v. Rex Oil Co.*, 147 Cal. 659, 82 P. 317.

A writing in the form of a deed, but reserving rent, is in legal effect a lease.—*Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915. Lease may be good without the signature of the lessee.—*Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 P. 516.

There are cases making refined distinction between a lease proper and a sale of the mineral in place. They may involve tax questions and occur only in long leases treating the contract as a sale of the coal or mineral and not as an agreement to work it out on a royalty.—*Delaware Co. v. Sanderson*, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394; *Browning v. Boswell*, 215 F. 826, 132 C. C. A. 168.

Where lessees continue to work for years after the termination of the lease they are considered to be working the same as if the lease had been renewed.—*Wallace v. Dorris*, 218 Pa. 534, 67 Atl. 858.

Set Work.

In large mines worked on the tribute system, the lease is usually verbal between the manager and the miner, and is more in the nature of a contract of hiring, the foreman retaining general control of the work.

Dead Work.

The following form is correct to the extent of the usual covenants, but there are often special covenants added in regard to "dead work" and other matters. Dead work is a term of the popular language, and means sinking shafts and running drifts, adits or cross-cuts, or it may embrace everything except *stoping* and the timbering incidental to stoping. Its meaning being so general it should not be used at all in the instrument and the intention should be covered by more exact expressions.

It is a common stipulation to require no royalty for ore extracted in sinking or in driving levels. Where dead work is to be paid for, care should be taken to express whether the compensation is to come "out of the first mill returns" or "out of the royalty." In the latter case the lessor pays for all of it. In the former he pays a share equivalent to his proportion of the proceeds.

The Royalty Reserved Necessarily Varies, 20 or 25 Per Cent being the usual amount, and 5 and 75 per cent being extreme limits.

FORM OF LODE LEASE.

THIS INDENTURE, made this *first* day of *May*, in the year of our Lord one thousand nine hundred and sixteen, between *Harvey C. Vernon of Chicago, State of Illinois*, lessor, and *Frank H. Stanwood, of Salina, State of Colorado*, lessee or tenant: Witnesseth, that the said lessor, for and in consideration of the royalties hereinafter reserved and the covenants and agreements hereinafter expressed, and by the said lessee to be kept and performed, hath granted, demised, and let and by these presents doth grant, demise and let unto the said lessee all the following described mine and mining property, situate in *Four Mile* Mining District, County of *Routt*, State of Colorado, to-wit: *The Owl Bird Lode Mining Claim, Survey Lot No.* 172, together with the appurtenances.

To have and to hold unto the said lessee, for the term of *one year* from date hereof, expiring at noon on the *first* day of *May*, 1917, unless sooner forfeited or determined through the violation of any covenant hereinafter against the said tenant reserved.

And in consideration of such demise, the said lessee doth covenant and agree with said lessor as follows, to wit:

1. To enter upon said mine, or premises, and work the same mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the development and preservation of the same as a workable mine, and to the special covenants hereinafter reserved.

2. To work and mine said premises as aforesaid steadily and continuously, from the date of this lease with at least two persons employed underground, for at least twenty shifts to the man each calendar month.

3. To well and sufficiently timber said mine at all points where proper, in accordance with good mining; and to repair all old timbering wherever it may become necessary.

4. To allow said lessor and his agents from time to time, to enter upon and into all parts of said mine for purposes of inspection.

5. To not assign this lease or any interest thereunder, and to not sublet the said premises or any part thereof, without the written assent of said lessor, and to not allow any person not in privity with the parties hereto, to take or hold possession of said premises, or any part thereof, under any pretense whatever.

6. To occupy and hold all cross or parallel lodes, spurs or mineral deposits of any kind which may be discovered by the said lessee, or any person under him, in any manner, by working within, or from the demised ground, as the property of said lessor with privilege to said lessee of working the same as parcel of said demised premises.

7. To keep at all times the drifts, shafts, tunnels and other workings thoroughly drained and clear of loose rock and rubbish, unless prevented by extraordinary mining casualty.

8. To do no underhand stoping, and to make all shafts 7 feet long by 4 feet wide in the clear, and all drifts 6 feet high by 4 feet wide in the clear.

9. To pay to said lessor as royalty 25 per cent of the net mill returns of all ore to be extracted from said premises by delivery of such ore with all convenient speed in lots as mined to some mill or regular ore buyer in Denver or Pueblo, and leaving with such mill or ore buyer the percentage of mill returns aforesaid for delivery to the lessor. *(See clause 9, Covenant for Graded Royalty, or Royalty on Price Per Ton.)*

10. To deliver to said lessor the said premises with the appurtenances, and all improvements in good order and condition, with all drifts, shafts, tunnels and other passages thoroughly clear of loose rock and rubbish, and drained, and the mine ready for immediate continued working (accident not arising from negligence alone excusing) without demand or further notice, on the said 1st day of *May*, A. D. 1917, at noon, or at any time previous, upon demand for forfeiture.

11. And finally, that upon violation of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of the said lessor, expire, and the same and said premises, with the appurtenances, shall become forfeit to said lessor; and said lessor or his agent may thereupon, after demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without force and with or without process of law; or at the option of said lessor the said tenant and all persons found in occupation may be proceeded against as guilty of unlawful detainer. *(Here insert option, p. 351.)*

Each and every clause and covenant of this Indenture shall extend to the heirs, executors, administrators and lawful assigns of all parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals.

HARVEY C. VERNON. [SEAL.]
FRANK H. STANWOOD. [SEAL.]

(For acknowledgment, if desired, see p. 332.)

Special Covenants.

Where the law allows a lien in favor of lessee's employees, unless notice is posted, there should be a special covenant to keep such notice posted.

Where a large product is expected it is usual to require lessee to make a monthly report of his pay roll and mill returns, and unusual conditions may suggest many other special covenants, particularly in coal leases, but as a rule the more simple the lease the better for both sides.

The covenant to not assign is often omitted, especially where an option goes with the lease.

It is not unusual to insert a covenant releasing obligation to work in case of labor strikes. In this connection see *Hitchman Co. v. Mitchell*, where the United Mine Workers of America were enjoined.—202 F. 512.

Covenant for Graded Royalty.

9. To pay to said lessor as royalty 10 per cent of the net mill returns of all ore to be extracted from said premises running 30 ounces of silver or under to the ton; 20 per cent on ore running over 30 and not exceeding 50 ounces to the ton; 30 per cent on all ore running over 50 ounces—by delivering all the ore in lots as mined to some mill or to some regular ore buyer in *Denver or Pueblo* and leaving with such mill or ore buyer the several percentages of mill returns as aforesaid for delivery to lessor.

Estimate of royalty after deducting freight and mill charges is said to be based on the "net" mill returns. Where the royalty is much graded and made dependent on the amount of lead or copper, as well as silver or gold, the more simple form is to reserve it on the "price per ton" paid by the ore buyer, which is 90 to 95 per cent of the bullion and base metal value, after deducting treatment charges; but in the "price per ton" the freight has not been estimated.

Royalty on Price Per Ton.

9. To pay to said lessor as royalty 10 per cent of the net mill returns of all ore sold for $20 per ton or less, net price after deducting freight and mill charges, and 20 per cent of the like net mill returns of all ore sold for more than $20 per ton net price as aforesaid by delivering all the ore in lots as mined to some mill or to some regular ore buyer in *Denver or Pueblo*, and leaving with such mill or ore buyer the several percentages aforesaid for delivery to the lessor.

Net mill returns are the sums paid for the values in the ore after deducting all charges for carriage in any form, assays and mill charges.

Freight is paid on the gross weight and the ore paid for on the net weight.

The mill returns, upon which settlement between lessor and lessee is made, are substantially according to the form on following page.

PLACER LEASE.

Follow the form for Lode Lease except in the description and the numbered covenants, which may be as follows:

Description.

The Yellow Bug Placer Mining Claim, Survey Lot No. 88, and 300 inches of water in the Arapahoe ditch.

Covenants.

1. To enter upon said mine or premises and work the same so as to take out the greatest possible amount of gold with due regard to the development and preservation of the unwashed ground for future continued working and to the special covenants hereinafter reserved.

2. To work and wash said premises steadily and continuously from the date of this lease with a force of at least two men and with as much of said water as can be obtained and used. Cessation of work for the total number of three secular days in any one calendar month shall be considered a violation of this covenant. But no work shall be required while the ground is frozen.

3. To take care of the dump and tailings so as to prevent their accumulation upon any ground of the lessor remaining unworked.

4 and 5. *(Same as lode lease.)*

MINING LEASE.

THE ASPEN SAMPLING COMPANY

Bought of DURANT MINING COMPANY,
Lease John Jones, Block 3, on 17.

Aspen, Colo., Jan. 18, 1916.

SAMPLER LOT No.	MINE LOT No.	WEIGHTS				ANALYSIS								Silver Quotation	Lead Quotation	Loss in Smelting %	Lead Per Unit	Cost of Treatment	Total Net Per Ton	AMOUNT RECEIVED
		Gross Pounds	Per Cent Moisture	Pounds Moisture	NET POUNDS	Ozs. Silver	% Lead	% SiO_2	% Fe	% CaO	% S	% Zn	$BaSO_4$							
250	1035	128,200	8	10,256	117,944	20	14	4	6.3	15	tr.	4	tr.	56⅜	5.90	5	68	$1.77	$18.46	$1,088.62
														Less Freight						192.30
																				896.32
														Less Sampling						44.87
																				851.45
														Less Tunnel Charges						48.08
																				803.37
														Less 25% Royalty						200.84
																				$602.53

THE ASPEN SAMPLING CO.
By GUY V. NEWTON, Manager

6. To clean up the gold not oftener than once every two weeks and at least as often as once in four weeks and to give 48 hours' notice to lessor of the date intended for clean up, and at each clean up lessor shall have the right to be personally present or to send some one person to represent him and be present and assist at such clean up and at the retorting of the amalgam and the weighing of the retort, and to make no clean up, partial or general, without giving such notice.

7. To pay as royalty to the lessor 25 per cent of the gross proceeds of working under this lease by delivery immediately after each clean up (*) of the whole of the retort to the lessor or to his agent present on the ground, and the said lessor covenants forthwith to cause the same to be shipped to the mint at Denver or to some regular gold buyer at Fairplay or Denver and to return to lessee 75 per cent of the net proceeds.

8. To deliver to said lessor the said premises with the appurtenances in good order and condition and the ground and water ready for immediate continued use and working without demand or notice on said first day of May, A. D. 1917, or at any time previous upon demand for forfeiture.

Second Form of Royalty Covenant.

After the (*) proceed as follows:

To the lessor or to his agent present on the ground, of one-quarter by weight of the amalgam or of the retort as he may elect.

Third Form of Royalty Covenant.

After the (*) proceed as follows:

Of 25 per cent of the net mint returns or proceeds of sale to some regular gold buyer at Fairplay or Denver for use of the lessor.

Covenant to Work.

Where royalty is reserved in the usual form there is an implied covenant to keep at work.—*Rorer Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; *Aye v. Philadelphia Co.*, 193 Pa. 451, 74 Am. St. Rep. 696, 20 M. R. 177, 44 Atl. 555. Otherwise where there is a fixed rent, or a rent based on an assumed minimum production.—*McIntyre v. McIntyre Co.*, 11 N. E. 645, 105 N. Y. 264.

The ordinary covenant to "take out the greatest amount of ore possible" is enforceable as such and is not a mere condi-

tion. The measure of damages in such case would depend on the amount of ore that could have been mined with reasonable diligence.—*Macon v. Trowbridge,* 38 Colo. 330, 87 P. 1147.

Dredge company held for royalties on ground worked and for gravel which it should have worked.—*Northern Light M. Co. v. Blue Goose Co.,* 25 Cal. App. 282, 143 P. 540.

And for failure to commence work in a reasonable time the lease may be cancelled.—*McIntosh v. Robb,* 4 Cal. App. 484, 88 P. 517.

For breach of covenant the lessor may elect between forfeiture and damages.—*Brooks v. Gaffin,* 90 S. W. 808, 192 Mo. 228.

An agreement to work is not necessarily an agreement to work continuously.—*Caley v. Portland,* 12 Colo. App. 397, 56 P. 350. But the case of *Zelleken v. Lynch* holds that the phrase means to work to the end of the term.—80 Kan. 746, 46 L. R. A. (N. S.) 659, 104 P. 563.

Failure to start work is same as quitting.—*Woodward v. Mitchell,* 140 Ind. 406, 39 N. E. 437, 439, 18 M. R. 158. A parol agreement as to what shall be considered sufficient work is binding on lessor and his grantees.—*Bartley v. Phillips,* 36 Atl. 217, 18 M. R. 542, 179 Pa. 175.

To recover substantial damages against a lessee failing to work, the plaintiff must show that the ore could have been mined to a profit.—*Colorado F. Co. v. Pryor,* 25 Colo. 540, 57 P. 51, 19 M. R. 544.

Construction of long, formal, coal mine lease as to right to replace machinery and fixtures, change plan of approaches, abandon old workings, etc.—*Junction M. Co. v. Springfield J. Co.,* 78 N. E. 902, 222 Ill. 600.

A lessee is not bound under covenant to return in as good condition as when received, to restore buildings accidentally destroyed by fire.—*Id.*

Exhausted Mine—Faults.

There are many cases which hold that breach of covenant to work, or to pay a minimum rent, is excused when the ore in the mine becomes exhausted.—*Brooks v. Cook,* 135 Ala. 219, 34 So. 960, 22 M. R. 456; *Wilson v. Big Joe Co.,* 134 Iowa 594, 112 N. W. 89; *Ross v. Savage,* 66 Fla. 106, 108, 63 So. 148. Or when the lessee fails to find any ore.—*Girton v. Daniels,* 35 Nev. 438, 129 P. 555.

A lessee bound to take out all the coal under the demised tract is not bound to take out coal which could not be taken out at a profit.—*Wilson v. Big Joe Co.,* 134 Iowa 594, 112 N. W. 89. *Troxell v. Anderson C. Co.,* 62 Atl. 1083, 213 Pa. 475, and *Wilson v. Big Joe Co.,* 112 N. W. 89, 134 Iowa 594, are cases in which lessees of coal mines sought relief against rents on account of encountering faults. In the first cited case relief was denied on the assumption that lessee had no right to open the ground by instroke.

Whether the lessees worked "mine fashion" as required by the terms of the lease is a jury question, but the Court construed the covenant "to get all pay dirt as low as 2 cents per pan" not to mean all pay dirt of that value in the mine but only such as it would pay to get by the use of miner-like methods.—*Belsea v. Tindall,* 190 F. 440, 111 C. C. A. 244.

The plea of "exhausted mine" is for the defending lessee to allege and make good.—*Martin v. Walsenburg Co.,* 200 F. 270.

Instroke.

This term covers the right to work one mine through another. It is of importance in many colliery cases and is becoming so in deep lode mining. Instroke is defined and fully considered in MacSwinney on Mines, p. 230. It will be allowed to lessee unless his papers covenant against it.—*Schobert v. Pittsburg Coal Co.,* 254 Ill. 474, Ann. Cas. 1913B, 1104, 40 L. R. A. (N. S.) 826, 98 N. E. 945.

But trespass by instroke will be enjoined.—*Trustees v. Lehigh Valley Co.,* 236 Pa. 350, 41 L. R. A. (N. S.) 1059, 84

Atl. 820. And the lease may be so worded as to cut out the instroke right.—*Sharum v. Whitehead Co.*, 223 F. 282. See *Bagley v. Republic Co.*, 193 Ala. 219.

Right to Quit.

Under the covenant to work in the above forms, the lessee has no right to quit at discretion.—*Northern Light M. Co. v. Blue Goose Co.*, 25 Cal. App. 282, 143 P. 540. If such right is to be given, as in most instances of common equity it should be given, insert after the second covenant:

The said lessee reserving the right to quit and abandon after at least two months' continuous work under this covenant,

or as the case may be. When the party quitting is to give notice it is not always material that it be given in the manner stipulated.—*McCahan v. Wharton*, 121 Pa. 424, 15 Atl. 615, 16 M. R. 239. The lessee may quit at will under a lease containing no covenant to work.—*Glasgow v. Chartiers Co.*, 152 Pa. 48, 25 Atl. 232, 17 M. R. 523.

Co-Tenant Owners—Partnership Lessees.

The legal relation of co-lessees is that of partners.—*Meagher v. Reed*, 14 Colo. 335, 350, 9 L. R. A. 455, 24 P. 681; *Lamont v. Reynolds*, 26 Colo. App. 347, 144 P. 1131; *Manville v. Parks*, 7 Colo. 128, 2 P. 212, 15 M. R. 565; *Walker v. Bruce*, 44 Colo. 109, 97 P. 250.

Co-owners, however, are not necessarily partners. They may work it under such arrangement as does not constitute a partnership.—*Howard v. Luce*, 171 F. 584.

Only those co-owners who join in working the mine become partners and the idle co-tenants are not liable for its debts.—*Madar v. Norman*, 13 Ida. 585, 92 P. 572; *Peterson v. Beggs*, 26 Cal. App. 760, 148 P. 541. A co-lessee may quit and his liability cease.—*Lamont v. Reynolds, supra.*

Quitting work but with intent to resume does not dissolve the partnership.—*Nielson v. Gross*, 17 Cal. App. 74, 118 P. 725.

The lessees of a mine and those whom they take in as associates are partners, although the lease forbade an assignment of the lease.—*Bentley v. Brossard,* 33 Utah 396, 94 P. 736.

When one of the partners assigns his interest the partnership is not dissolved, but the new party takes the grantor's place.—*Loy v. Alston,* 172 F. 90, 96 C. C. A. 578.

A retiring partner is liable for wages where the miner has no notice that he had sold out.—*Kelley v. McNamee,* 164 F. 369, 90 C. C. A. 357, 16 Ann. Cas. 299, 22 L. R. A. (N. S.) 851.

A partnership exists where the several owners operate the mines together, one working, himself, and one putting in a man.—*Walker v. Bruce,* 44 Colo. 109, 97 P. 250.

A mining partnership contract is not within the statute of frauds.—*Whistler v. MacDonald,* 167 F. 477, 93 C. C. A. 113.

A threat of one partner to make no further advances and let the mine drown unless his partner signed the contract did not amount to duress.—*Connolly v. Bouck,* 174 F. 312, 98 C. C. A. 184.

The decease of one of the parties does not dissolve the partnership.—*Boehme v. Fitzgerald,* 43 Mont. 226, 115 P. 413.

The essentials of the pleadings stated in action by one against another or by administrator against the survivor.—*Id.*

Distinction between mining and trading partnership stated. —*Dailey v. Fitzgerald,* 17 N. M. 137, Ann. Cas. 1914D, 1183, 125 P. 625.

In *Paul v. Cragnaz,* 25 Nev. 293, 47 L. R. A. 540, 59 P. 857, 60 P. 983, the lessee of a third interest was allowed heavy damages against the majority owner disputing his right to enter and mine. We can not gather from the opinion upon what theory this anomalous case was decided. BELKNAP, J., dissented. It was not based on plaintiff's right to a third of the profits.

Assessments—Forfeiture to Co-Partner.

An assessment is defined in *Shaw v. Horner,* 7 Colo. App. 83, 42 P. 689, as "an apportionment among the parties inter-

ested, of an amount of money necessary and not on hand for development purposes." It must be levied by one having authority, each partner must have notice of it and a forfeiture does not ensue for failure to pay unless there is some contract to that effect. Such a contract was enforced in *Joseph v. Davenport,* 116 Iowa 268, 89 N. W. 1081, 22 M. R. 171.

Fixtures.

Unless otherwise covenanted the fixtures belong to the lessee and are removable.—*Conrad v. Saginaw Co.,* 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817. And this applies even to a forfeited lease.—*Mickle v. Douglas,* 75 Iowa 78, 39 N. W. 198, 17 M. R. 137. A mortgage on fixtures was held good after forfeiture in *Alberson v. Elk Creek Co.,* 39 Or. 552, 65 P. 978. But after forfeiture he must remove them within a reasonable time.—*Perry v. Acme Oil Co.,* 44 Ind. App. 207, 88 N. E. 859.

Engines, boilers, hoisting works, pumps and the like annexed to the land for mining are fixtures. And a contract that they shall be considered personalty is not good against creditors.—*Arnold v. Goldfield Co.,* 32 Nev. 447, 109 P. 718.

The terms of the lease will hold as fixtures, machinery furnished to the lessee.—*Puzzle M. Co. v. Morse Bros. Co.,* 24 Colo. App. 74, 131 P. 791.

Letting by Agent.

The agent in charge has, under his general and implied powers, the right to let short leases of the ground, in blocks or parcels.—*Bicknell v. Austin Co.,* 62 F. 432.

And though unauthorized to lease, if the company stand by and allow the lessee to spend money, they will be bound.—*Hoosac Co. v. Donat,* 10 Colo. 529, 16 P. 157.

In *Franklin v. Havalena Co.,* an unauthorized corporate lease and bond was held void. The lessee to account for ores mined but allowed to offset instalments paid.—(Ariz.) 157 P. 986.

Lease by One Co-Tenant—Majority Control.

It has been repeatedly held that one co-tenant can not give a lease of the whole mine technically binding on all the co-owners. But it is constantly done and often without any moral wrong attaching to it. Of course, there must be an accounting to the non-joining co-tenant on the royalties received.—*Cascaden v. Dunbar,* 191 F. 471, 112 C. C. A. 115.

Where they can not agree as to mode of working, a majority must control.—*Dougherty v. Creary,* 30 Cal. 290, 89 Am. Dec. 116, 1 M. R. 35, 36; *Blackmarr v. Williamson,* 57 W. Va. 249, 4 Ann. Cas. 265, 50 S. E. 254.

A Colorado Act of 1911, p. 474, gives the right to a majority interest to work the mine, provided a statement of intent to work it be recorded. The act is involved and confusing, but on close construction seems to do nothing more than to declare what the law was before the act was passed except to require the filing of this useless statement.

Assignment.

A lessee is not in general released from personal liability by assigning his lease; but remains in the nature of a surety to his landlord.—*Pittsburg Co. v. Greenlee,* 164 Pa. 549, 30 Atl. 489; *Wilson v. Gerhardt,* 9 Colo. 585, 13 P. 705.

A Non-Assessable Interest in a Lease Is an Interest Charge-able with its full share of all cost of mining, as well as of freight and treatment as far as the ore proceeds will pay such cost, but not chargeable in case of working to a loss. The decision in *Maloney v. Love,* 11 Colo. App. 288, 52 P. 1029, 19 M. R. 310, holding it entitled to a full share of the gross proceeds is wholly against the meaning of the term as understood by miners.

In *Taylor v. Thomas,* 31 Colo. 15, 71 P. 381, 22 M. R. 527, a non-assessable interest in a lease was charged with its full proportion of expenses to the extent of the ore proceeds. This decision necessarily overrules the Maloney case.

Forfeiture.

Unless the lease provide for forfeiture none occurs for non-payment of rent or breach of covenant.—*Plummer v. Hillside Co.*, 104 F. 208, 43 C. C. A. 490; *Wakefield v. Sunday Lake Co.*, 85 Mich. 605, 49 N. W. 135. A forfeiture enforced by collusion with employees of lessee is not lawful.—85 Mich. 605, 49 N. W. 135. Forfeiture can not be enforced by a party who is himself in default.—*Ingram v. Golden Co.*, 25 Wash. 318, 65 P. 549.

Draining and pumping are counted as labor under a covenant to keep at work.—*Miller v. Chester Co.*, 129 Pa. 81, 18 Atl. 565, 16 M. R. 288.

Where parties have acted loosely in complying with the terms of lease the lessor can not abruptly become strict and declare a forfeiture.—*Westmoreland Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *Price v. Black*, 126 Iowa 304, 101 N. W. 1056. A lessor can not lull the tenant by indulgence and then suddenly enforce forfeiture.—*Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762.

In *Montrozona Co. v. Thatcher*, 19 Colo. App. 371, 75 P. 595, a lease was held forfeited for ten days' delay beyond the time limited to sink 100 feet. This seems a severe ruling.—*Mathews Co. v. New Empire Co.*, 122 F. 972; *Jones v. Scott*, 58 Atl. 281, 209 Pa. 177.

When forfeiture is provided for on account of certain breaches, there is no forfeiture for other breaches; and none for breach of implied covenants.—*Core v. N. Y. Co.*, 52 W. Va. 276, 43 S. E. 128; *Rose v. Lanyon Z. Co.*, 68 Kan. 126, 74 P. 625; *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 P. 516.

The forfeiture of the lease for breach of contract to not assign forfeits the option.—*Behrens v. Cloudy*, 50 Wash. 400, 97 P. 450.

A lessor (or vendor) can not forfeit and at same time recover instalments.—*Youngs M. Co. v. Courtney*, 219 F. 868.

St. Louis Union Trust Co. v. Galloway Co., 193 F. 106, is a well-considered case on the limitations against forfeiture of a lease of a large colliery, working the coal field demised and other coal by instroke.

Relief Against Forfeiture.

Courts should promptly seize upon any circumstances which the dealings between the parties will allow to show a waiver, and so relieve against "the harsh and at times unjust remedy of forfeiture."—*Spedden v. Sykes*, 51 Wash. 267, 98 P. 752.

Equity will not enforce a forfeiture, but will relieve a defaulting lessee who is willing and ready to pay and proceed.—*Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618.

Royalty.

Under a mining lease covenanting to pay a certain royalty and that it shall amount to at least a given sum, lessees are not liable if after full testing no merchantable ore is found.—*Gribben v. Atkinson*, 64 Mich. 651, 15 M. R. 428, 31 N. W. 570. And see on this point cases cited under ORE CONTRACTS and EXHAUSTED MINE.

A mining lease based on royalty as its main consideration is forfeited after unreasonable delay to begin work.—*Mills v. Hartz*, 77 Kan. 218, 94 P. 142.

Oil produced by a lessee is his property and he has the right to sell the whole of it although a royalty percentage is reserved to the lessor.—*Coalinga Co. v. Associated Co.*, 16 Cal. App. 361, 116 P. 1107.

The question under a lease, whether net profits on "culm" were to be based on the total cost of mining or on the cost of handling the "culm" only, held a question for the jury.—*Woodruff v. Gunton*, 71 Atl. 849, 222 Pa. 376.

In calculating minimum royalty each year is a period by itself.—*Woodruff v. Gunton*, 222 Pa. 384, 71 Atl. 851.

Changing terms of royalty in written lease by parol is valid and not within the Statute of Frauds.—*Nonamaker v. Amos*,

76 N. E. 949, 73 Ohio St. 163, 112 Am. St. Rep. 708, 4 Ann. Cas. 170, 4 L. R. A. (N. S.) 980.

The receipt of royalty admits the validity of the lease.—*Bicknell v. Austin Co.,* 62 F. 432; *Burkhard v. Mitchell,* 16 Colo. 376, 26 P. 657.

A lessee has the right to show that the 75 per cent royalty, which his lease called for, was a mutual mistake, 25 per cent having been intended.—*Kuzek v. Magaha,* 148 F. 618, 76 C. C. A. 465.

Miscellaneous Decisions.

An advertisement, bid and acceptance make a complete agreement for a lease.—*Cochrane v. Justice Co.,* 16 Colo. 415, 26 P. 780. And the lessor can not after such proceedings insist on new and arbitrary terms.—*Id.*

Whether a lease has been extended is a question of fact which the Court can not take away from the jury.—*Riddle v. Mellon,* 147 Pa. 30, 23 Atl. 241.

A tenant can not take leases of two hostile titles and then compel his lessors to interplead.—*Standley v. Roberts,* 59 F. 836, 8 C. C. A. 305.

A lessee attempting to relocate the ground forfeits all rights under his lease.—*Silver City Co. v. Lowry,* 19 Utah 334, 57 P. 11, 20 M. R. 55. Affirmed *Lowry v. Silver City Co.,* 179 U. S. 196, 45 L. Ed. 151, 21 Sup. Ct. 104, 21 M. R. 113.

A lease of a mining shaft means not only the shaft but the ground accessible through such shaft.—*Wesling v. Kroll,* 78 Wis. 636, 47 N. W. 943.

Waiver of conditions may be shown by parol.—*Equator Co. v. Guanella,* 18 Colo. 548, 33 P. 613; *Bullis v. Presidio M. Co.,* (Noyes) 75 Tex. 540, 12 S. W. 397. And release of royalty.—*Crawford v. Bellevue Co.,* 183 Pa. 227, 38 Atl. 595.

That a lessee did not drive the entry as fast as agreed is not sufficient to justify a forced rescission, and the Court will consider hard times as an element of excuse.—*Ross v. Sheldon,* (Ky.) 119 S. W. 225.

Where the provisions of a lease are susceptible of different constructions, the one which the parties have acted upon will be assumed to be correct, and one of them can not later assert a different construction to the detriment of the other.—*McKeever v. Westmoreland Coal Co.*, 219 Pa. 234, 68 Atl. 670. And a surrender of the lease may be proved by the conduct of the parties.—*Pursel v. Reading Co.*, 232 F. 801.

LICENSE.

The material distinctions between a lease and a license are that

1. A license is not exclusive.

2. It invests the licensee with no property in the mineral until it is severed from the ground.

3. It may be revoked at any time.

4. It is not transferable.

The above stated differences show that a license practically amounts to a mere privilege to work at the owner's will. It is a permission sufficient to defeat the charge of trespass but is not that property in the soil such as parties contracting on equal terms for permanent working naturally bargain for. On the other hand, it is usually granted without any, or for a nominal consideration.

It has been held that a lease which did not *bind the lessee to work* was a mere license.—*Wheeler v. West*, 71 Cal. 126, 11 P. 871, 78 Cal. 95, 20 P. 45; *Collins v. Smith*, 151 Ala. 133, 43 So. 838. But these rulings would be indefensible if the party had gone into possession under the implied covenant to work. In every lease, verbal or written, reserving royalty, there is an implied covenant to work (See p. 364) and the *express* obligation to work is not one of the distinctions between lease and license. The exclusive right to mine implies a lease and not a license.—*Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937; *Stinson v. Hardy*, 27 Or. 584, 41 P. 116.

An option to purchase with privilege to work is a license coupled with an interest; and after expenditures made is irrevocable.—*Hall v. Abraham,* 44 Or. 477, 75 P. 882. The same where there are expenditures but no option.—*Hosford v. Metcalf,* 113 Iowa 240, 84 N. W. 1054, 21 M. R. 198.

The general nature of a license as distinguished from a lease or other like grant is stated in *Massot v. Moses,* 3 S. C. 168, 16 Am. Rep. 697, 8 M. R. 607; *Doe v. Wood,* 9 M. R. 182, 2 B. & A. 724; *McCullagh v. Rains,* 75 Kan. 458, 89 P. 1041.

1. Not Exclusive.

The owner may work himself, or allow others to work upon the same ground.—*Johnstown Co. v. Cambria Co.,* 9 M. R. 226, 32 Pa. 241, 72 Am. Dec. 783; *Woodside v. Ciceroni,* 93 F. 1, 35 C. C. A. 177.

2. Passes No Property or Vested Estate.

A license is authority for the temporary occupation of land or to enter upon and do particular acts in and about it. It creates no estate.—*Fuhr v. Dean,* 26 Mo. 116, 69 Am. Dec. 484, 6 M. R. 216. After it is broken by licensee the rock in a quarry belongs to him.—*McKee v. Brooks,* 20 Mo. 526.

3. Revocability.

Although revocable the owner can not arbitrarily oust the licensee without compensation for expenditures made.—*Bush v. Sullivan,* 9 M. R. 214; 3 *G. Greene* (Iowa) 344, 54 Am. Dec. 506. After a proper revocation the licensee has no title in what he continues to break and sever.—*Williams v. Morrison,* 32 F. 177. A license once given continues till revoked.—*Keeler v. Green,* 12 M. R. 465, 21 N. J. Eq. 27. An executed license (to build a ditch) amounts to a grant.—*De Graffenried* v. *Savage,* 9 Colo. App. 131, 47 P. 902. After revocation further working by licensee may be enjoined.—*Clark v. Wall,* 32 Mont. 219, 79 P. 1052.

4. Not Assignable.

Being only a personal privilege any transfer operates as a forfeiture.—*Dark v. Johnston,* 9 M. R. 283, 55 Pa. 164, 93 Am. Dec. 732. But if the license imply a grant of the ore it may be assigned.—*Muskett v. Hill,* 5 Bing. (N. C.) 694.

By One Co-Tenant.

As to whether at all or to what extent the license of one or more of several co-tenants is valid, see *Job v. Potton,* L. R. 20 Eq. 84, 14 M. R. 329; *Tipping v. Robbins,* 71 Wis. 507, 37 N. W. 427; *Omaha Co. v. Tabor,* 16 M. R. 184, 13 Colo. 41, 16 Am. St. Rep. 185, 5 L. R. A. 236, 21 P. 925.

In *Shaw v. Caldwell* a peculiar deed of a half interest in a mine was construed to be a grant of such half and as a license to work the other half.—16 Cal. App. 1, 115 P. 941.

PROSPECTING CONTRACT.

Much litigation has grown out of contracts of this kind owing to the loose manner in which they are generally undertaken and the strong inducements to shirk their obligations when a rich discovery has been made.—*Murley v. Ennis,* 12 M. R. 360, 2 Colo. 300; *Johnstone v. Robinson,* 16 F. 903, 12 M. R. 396, 3 McCrary 42.

The following form covers the legal points necessary to be guarded in this class of contract:

GRUB STAKE CONTRACT.

In consideration of provisions advanced to me by *Albert B. Roeder,* and of his agreement to supply me from time to time, as I may reasonably demand them, with tools, grub and mining outfit generally, and the sum of fifty dollars in hand paid, I agree to prospect for lodes and deposits in *Grand* County, *Utah,* and to locate all discoveries which I may consider worth the expenditure, and record the same in the joint names of said outfitter and myself, and in our names only, as equal owners.

My time and labor shall stand against his money, provisions, etc., as aforesaid. All expenses of survey and record shall be paid by the outfitter, and I agree to make no debts on account of this agreement. Work done on claims after record and before the expiration of this contract shall be considered as done under this contract, and no charge for labor or time shall be made for the same.

This contract shall stand good during the whole of the summer and fall of 1916 (expiring *Dec.* 1st) and during all of that period I will not work or prospect on my own account, or for any parties other than said outfitter.

Dated April 1, 1916. L. L. CRAPO.

I agree to the terms above stated.

ALBERT B. ROEDER.

Under the following form the prospector is allowed wages and takes a similar interest in lodes found.

AGREEMENT of date *March* 7, A. D. 1916, between *S. P. McGough*, *Robert Pitcairn*, and *Arthur D. Bullis*, outfitters, and *C. H. Pickett*, prospector.

WITNESSETH, That said outfitters agree to pay to said prospector on demand seventy-five dollars ($75) for the purchase of tools and packing outfit, and twenty-five dollars ($25) for railroad fare and expenses from Idaho Springs to Creede, and to allow said prospector wages at three dollars per day for each secular day after arrival at that place, until *November* 1, 1916, unless this contract is rescinded by notice before that date, and to pay all expenses of surveys and records to be made under this contract and for powder, fuse and other mining materials, if required by said prospector, to the extent of fifty dollars.

And in consideration of the premises, said prospector agrees industriously and to the best of his skill to prospect for lodes and deposits in the neighborhood of Creede camp, within the limits of Hinsdale, Rio Grande and Mineral counties, and to locate and record all discoveries which in his judgment are worth holding, in the joint names of all parties hereto—one-fourth interest to each.

And that he will use no company name and make no debts against his associates.

And that he will at least once each month report progress and all discoveries made, by letter, to said A. D. BULLIS.

All work done in development after record shall be considered as work done under this agreement.

And said prospector agrees further not to prospect on his own account nor for any other persons during the lifetime of this contract, and if at

any time within one year thereafter he shall become interested by location or purchase in any claims on which he may have prospected under this contract, he will allow his associates to take an equal interest with himself on the same terms and at the same cost at which he has acquired such interest.

On final settlement full wages are to be allowed as above agreed, but said prospector shall be charged with his full fourth of any expenses over and above the sums herein expressed, and shall account and pay for all tools and supplies on hand when contract expires, if terminated on his notice; but shall keep such tools and supplies if contract determined at outfitters' election, or by expiration of the full term limited, or by failure to remit proper account monthly on demand. And the said prospector shall have no right to quit on notice until he shall have prospected two full months under this agreement.

Witness the hands and seals of said parties.

S. P. McGOUGH. [SEAL.]
ROBERT PITCAIRN. [SEAL.]
A. D. BULLIS. [SEAL.]
C. H. PICKETT. [SEAL.]

The contract does not require a seal, and is not within the Statute of Frauds, and therefore may be verbal.—*Murley v. Ennis, supra; Moritz v. Lavelle,* 77 Cal. 10, 11 Am. St. Rep. 229, 18 P. 803, 16 M. R. 236; *Meylette v. Brennan,* 20 Colo. 242, 38 P. 75; *Raymond v. Johnson,* 17 Wash. 232, 61 Am. St. Rep. 908, 49 P. 492, 19 M. R. 56; *Shea v. Nilima,* 133 F. 209, 66 C. C. A. 263; *Doyle v. Burns,* 123 Iowa 488, 99 N. W. 195; *Mack v. Mack,* 39 Wash. 190, 81 P. 707; *Cascaden v. Dunbar,* 157 F. 62, 84 C. C. A. 566; *Clark v. Mitchell,* 35 Nev. 447, 130 P. 760, 134 P. 448.

The association is practically a partnership.—*Lawrence v. Robinson,* 12 M. R. 387, 4 Colo. 567; *Abbott v. Smith,* 3 Colo. App. 264, 265, 32 P. 843.

A grubstake contract does not make a partnership unless it goes beyond the mere agreement to furnish supplies in consideration of an interest in the discoveries.—*Costello v. Scott,* 30 Nev. 43, 93 P. 1, 94 P. 222.

Where a partnership for the location of claims was practically stranded one of the parties was justified in transferring

a part of the property to prevent the loss of it all by failure to do the annual labor.—*Id.*

A party who enters into a prospecting lease, each one to be interested in proportion to his payments, has no equity if he fails to tender his share until after mineral is struck.—*Cameron v. Burnham,* 146 Cal. 580, 80 P. 929.

If the outfitter neglect to furnish the agreed and necessary supplies, such failure may be treated as a condition precedent, and the prospector is at liberty to search for mineral upon his own account.—*Murley v. Ennis, supra; Miller v. Butterfield,* 17 M. R. 222, 79 Cal. 62, 21 P. 543.

Where a prospector made locations which he concealed from his outfitters, and afterwards sold, he was compelled to account for the outfitters' share of the price.—*Jennings v. Rickard,* 15 M. R. 624, 625, 10 Colo. 395, 15 P. 677. But he was not held in this instance to account to outfitter for any share in a lode, the float of which he discovered while prospecting, but did not find the lode till afterward.

A party so locating in his own name becomes trustee for the benefit of his associates.—*Cascaden v. Dunbar,* 157 F. 62, 84 C. C. A. 566.

Where an association for prospecting purposes is abandoned, the several late partners may perfect locations on discoveries made on their several account.—*Page v. Summers,* 15 M. R. 617, 70 Cal. 121, 12 P. 120. If one of the associates quits before mineral is struck he can not claim an interest in the perfected location.—*McLaughlin v. Thompson,* 2 Colo. App. 135, 29 P. 816. Delay to assert an interest in the discoveries is fatal.—*Cisna v. Mallory,* 19 M. R. 227, 84 F. 851.

When a prospecting partnership was ended, but some of the party afterwards assayed a piece of rock picked up on the first trip, went back and found a lode of value, the other original parties had no equity in this discovery.—*McGahey v. Oregon King Co.,* 165 F. 86.

When the discoverer points out the place for location upon a verbal arrangement with the second party to take up the

claim for their joint benefit and the second party excludes the discoverer from the location there arises a resulting trust in favor of the discoverer.—*Stewart v. Douglass,* 148 Cal. 511, 83 P. 699.

Where a defendant located a claim in his own name and sold it to a company for stock, being under prospecting contract with plaintiff, plaintiff is entitled to his share of the stock upon payment of his share of the expenses.—*Mack v. Mack,* 39 Wash. 190, 81 P. 707.

As to the degree of proof necessary to establish the contract compare *Rice v. Rigley,* 20 M. R. 553, 7 Ida. 115, 61 P. 290, and *Morrow v. Matthew,* 10 Ida. 423, 79 P. 196. The consideration must be adequate. Fifty dollars is not enough to outfit a prospector from California to Alaska.—*Prince v. Lamb,* 20 M. R. 419, 128 Cal. 120, 60 P. 689.

A contract to convey one-fifth interest in whatever mining property defendant might locate or acquire, held non-enforceable by specific performance, because inequitable for want of limitation of time and also, in this particular case, for inadequacy of consideration.—*Marks v. Gates,* 154 F. 481, 83 C. C. A. 321, 12 Ann. Cas. 120, 14 L. R. A. (N. S.) 317.

Prospecting Private Ground.

Permission by the owner to prospect his ground must be exercised within a reasonable time.—*Cahoon v. Bayard,* 48 Hun 619, 1 N. Y. Supp. 814. But in *Woodside v. Ciceroni,* 93 F. 1, 35 C. C. A. 177, the license was construed as perpetual. On contract to prospect and test land for mineral value, for what amounts to sufficient search, see *Wells v. Leek,* 151 Pa. 431, 25 Atl. 101; *Jamestown Co. v. Egbert, Id.* 151; *Petroleum Co. v. Coal Co.,* 18 S. W. 65, 89 Tenn. 381; *Cleveland Cliffs I. Co. v. East Itasca Co.,* 146 F. 232, 76 C. C. A. 598.

The use of a witchhazel rod to test for ore not allowed as proof; the party agreeing to prospect is bound to sink.—*Berry v. Frisbie,* 120 Ky. 337, 86 S. W. 558.

Knowledge of value is good consideration for the sale of such knowledge.—*Reed v. Golden,* 28 Kan. 632, 42 Am. Rep. 180.

An extremely interesting case on this point is *Edelman v. Latshaw.* A stock certificate in a mining company had been sold for a nominal sum. After the sale and after the estate was settled up, the executor by letter addressed to the deceased, learned it had value and got it back for a small payment on false representations. But the knowledge of value contained in the letter which the executor had received, we believe was his property and not, as the Court held, the property of the then holder of the stock.—180 Pa. 419, 36 Atl. 926, 18 M. R. 608.

WORKING CONTRACTS.

The right to "work" a mine implies the right to remove and sell the ore.—*Bailey v. Bond,* 77 F. 406, 23 C. C. A. 206, 18 M. R. 466.

A contract to sink a shaft does not necessarily imply that the vein will be followed.—*Buckeye Co. v. Carlson,* 16 Colo. App. 446, 66 P. 168, 21 M. R. 499. The contractor is not bound to timber where the contract is silent on that point.—*No. 5 Min. Co. v. Bruce,* 3 M. R. 146, 4 Colo. 293.

Nor to furnish packer and tubing on contract to sink an oil well.—*Collier v. Monger,* 75 Kan. 550, 89 P. 1011.

Contract to sink to bed rock is complete without disclosing bed rock along the whole bottom of the shaft.—*Meehan v. Nelson,* 137 F. 731, 70 C. C. A. 165.

On a contract to sink on the vein, where the vein disappears the contractor is not bound to go down through the country.—*Woodworth v. McLean,* 97 Mo. 325, 11 S. W. 43, 17 M. R. 194.

Measure of recovery where work on shaft was ordered stopped before completion.—*Mooney v. York Co.,* 82 Mich. 263, 46 N. W. 376.

For breach of covenant by lessee to furnish plant, drive tunnel, etc., see *Cleopatra Co. v. Dickinson,* 28 Wash. 211, 68 P. 456.

Where the mine is to furnish supplies to the contractor, on failure he may quit and sue for the work already done.—*Davis v. Brown County Co.,* 21 S. D. 173, 110 N. W. 113; *Degnan v. Nowlin,* 5 Ind. Terr. 312, 82 S. W. 758; *Bailey v. Fredonia Co.,* 82 Kan. 746, 109 P. 411.

A contractor, stopped by the company on his contract to dig six gas wells, allowed the difference between the contract price and the cost of sinking—in other words, profits—as his measure of damages.—*Fredonia Co. v. Bailey,* 77 Kan. 296, 94 P. 258.

It is a fair construction of a contract of doubtful wording to sink several oil wells, that each should be paid for as it was sunk.—*Bailey v. Fredonia Co., supra.*

A covenant by the grantee of an undivided interest, to work the mine, is only a personal contract between the parties and its violation does not cancel the deed.—*Womble v. Womble,* 14 Cal. App. 739, 113 P. 353.

A miner hired for the mining season in Alaska and discharged without cause may recover for the balance of the season.—*Chokovitch v. Porcupine Co.,* 73 Wash. 48, 131 P. 459.

A contract to keep four men at work twenty days per month strictly construed—not allowing an equivalent number of shifts to be a compliance.—*Arkoosh v. Sorrenson,* (Utah) 150 P. 959.

EXAMINATION OF TITLE.

The written title to a mining claim begins with the location certificate, after which the conveyances and incumbrances should appear on the abstract as in other classes of real estate.

Inspection and Survey.

In addition to the abstract of title a survey and local inspection are indispensable to security, especially when the claim is not patented.

This inspection and survey should result in ascertaining the depth of discovery shaft, and whether it shows a well defined crevice; whether the location notice was duly posted and what it contains (p. 38); whether the stakes were properly set; whether the claim (as far as such fact can be fairly ascertained) is laid so as to cover the apex or general course of the lode, and more especially what shafts, tunnels, prospect holes, stakes, notices and improvements indicate the presence of hostile claims; and if such intervening or overlapping hostile claims are found, their seniority or juniority should be established.

The abstract (at least until patent) may show a clear chain of title, and may be based on a record senior to other records on the same vein, and still the title may be absolutely worthless.—*Patterson v. Hitchcock,* 5 M. R. 542, 3 Colo. 533.

An adverse senior discovery may exist within a few feet of the discovery of the claim under examination. Every hole or stake in proximity to the claim should be examined, its history traced, and the possibility of danger from that source guarded against.

Whether the annual labor has been done should also be ascertained.

Such inspection having been made, the course of examination will be as follows:

1.—THE ABSTRACT.

The abstract should be certified by the Recorder or by some reputable abstract firm, to contain all deeds and instruments filed or recorded, conveying, encumbering or in any manner affecting title to the property in question.

The abstract, however, amounts to nothing more than a guide or memorandum to the attorney in his examination.

Each deed and other instrument should be inspected at length, either by the original, by the record or by a certified copy.

The abstract should be furnished by the vendor at his own charges.

2.—LOCATION CERTIFICATE.

The material points to be observed in the location certificate are that it contains all that is required by the terms of A. C. Section 2324, and by the statute of the particular State; *ante* p. 68.

3.—CONVEYANCES.

A mine is conveyed by deed or encumbered by mortgage the same as other real estate.

The description should contain:

First—The name of the lode.

Second—If patented the number of the survey lot.

Third—Mining district, county and State.

Placer claims are usually described by their names, or if patented, by the names and number of the survey lot. In early locations they were often numbered with reference to the local gulch.

Deeds by Married Women.

The separate acknowledgment by a married woman is not required in Colorado, but where required in any State, such acknowledgment is generally essential to pass the wife's title, and is not merely a mode of proof of the delivery of the deed which is the usual function of an acknowledgment. See p. 341.

After Acquired Title.

A warranty deed conveys to the grantee any after acquired title of his grantor, and even a quit-claim made pending application, may carry the patented title to the grantee.—*Crane v. Salmon*, 41 Cal. 63; *Bradbury v. Davis*, 3 M. R. 398, 5 Colo. 265.

4.—PATENTS.

Where the claim is patented the patent should appear in the abstract although failure to record the patent is not the same as a like failure in case of a deed, a certified copy of the patent being always procurable from the General Land Office. The patent carries the title back to the entry at least.—*Benson Co. v. Alta Co.*, 145 U. S. 428, 36 L. Ed. 762, 12 Sup. Ct. 877, 17 M. R. 488.

The form of patent is quite different from that of a patent for agricultural lands, and contains specific exceptions as to easements, etc., and in the form used before 1888 and in instances since that date a plat of the survey; and excepts the surface ground of any previous entry crossing the line of the lot conveyed.

Where such exclusions occur the patentee has no claim to the vein in such excluded area. And in instances the date of application and of entry or even of the discovery may continue to be material where the question of relation arises. See p. 172.

Where a patent has been issued there is no necessity for a strict examination of the location certificate or of the various acts of location. It cures all defects incident to the location and in most instances any formal break in the chain of title prior to the application. And especially it cuts out prior hostile titles which have failed to adverse or to successfully maintain their adverse.

But it does not divest the title of a co-tenant dropped in the patent application (see p. 156), or at least it may be possible for a party having a claim to an interest in the possessory title to prove an equity, such as would make the patentee trustee of the title for his use. Nor does it dispense with the importance of a surface examination to see that the corners agree with the plat and that the survey lot substantially encloses the vein.

5.—PLAT OF PATENT.

In the older form of patents was inserted a diagram in which the ground conveyed was colored. Where the patent contains no such plat a certified copy should be obtained from

the Surveyor General's office, and a comparison of such copy of plat made with the metes and bounds contained in the description and the exclusions, if any, recited in the patent.

6.—LIENS.

A patent does not divest liens accrued against the possessory title. They are especially saved by the terms of R. S. Sec. 2332.

A judgment not becoming a lien until a transcript of the same has been recorded, such lien should show on the abstract.

There is also a class of possible liens which have to be the subject of parol inquiry, such as mechanics' liens, liens in favor of the State on an audited account or for fine or costs or suretyship in criminal cases.—R. S. Colo. Secs. 2009, 2010.

7.—PARTIES IN POSSESSION.

If parties are in actual possession, claiming adversely to the grantor, or claiming under him as lessees, their possession is an assertion of their claim, whatever it may be, of which the purchaser must take notice at his peril.—*Coffee v. Emigh,* 15 Colo. 184, 10 L. R. A. 125, 25 P. 83.

8.—CONCLUSION—DUTY OF COUNSEL.

If, from the abstract or from any of the certificates or from inspection of any deed, instrument or record in the chain of title; or as the result of his client's inspection and survey of the premises, or from any other source, the attorney is informed of any adverse title, or of any outstanding trust or adverse interests, or of any missing conveyance in the chain of title, or of any serious defect in the body or acknowledgment of any instrument of such a nature as to invalidate the title—the true condition of such title should then, with due secrecy, be expressed to the client. And when the attorney has satisfied his own mind upon all such questions of law as may have arisen during the course of his examination, the client has a right to be advised of all points which remain in doubt, and of any contingencies which may threaten the quiet enjoyment, or would obstruct a sale of the premises; and of all steps which if presently taken may avoid such conditions and perfect the

title, so that the true value of the title in law shall be represented to the client, that is, the intending purchaser. For in all cases of examination of title, the attorney should be selected, or at least assented to, by the purchaser, if it be a sale; by the lender of money, if it be a mortgage; because from the necessity of the case, he acts in the interest of the purchaser and of the lender, and not in that of the grantor or of the mortgagor; the charge for his examination should be made against the same side; the charge for the conveyance, on the other hand, is by custom made against the vendor.

ALIENS.

Ownership of Patented Title.

The right of aliens, resident or non-resident, to acquire title to patented property, depends upon the local legislation which in general fully provides for such ownership. The Colorado Statute (R. S. Chap. 3, and Art. 2, Sec. 27, of the Constitution) allows ownership by either resident or non-resident aliens.

A patent to the use of an alien may not be attacked except by direct governmental inquisition.—*Justice Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216, 40 P. 444, 18 M. R. 220.

Ownership of Possessory Title.

The Mining Acts throw open the public domain only to citizens and to those who have declared their intentions to become citizens.—A. C. Sec. 2319.

It would seem from their language that an alien could not locate a claim and if he could not locate, his holding by deed and perhaps by devise or descent might be questioned.

But the matter in its practical importance is controlled by the rule laid down in opinions of the Federal Supreme Court,

Manuel v. Wulff, 152 U. S. 505, 38 L. Ed. 532, 14 Sup. Ct. 651, 18 M. R. 85; *McKinley Co. v. Alaska Co.*, 183 U. S. 563, 46 L. Ed. 331, 22 Sup. Ct. 84, 21 M. R. 730, that the question of ownership by an alien is a matter between himself and the government and that as long as the government does not make inquisition to deprive him of his title, or become a party to proceedings to perfect the title, his title even when he claims under his own location is good against all the world.

The issue of alienage can not be raised in a mining suit where the United States is not a party.—*Holdt v. Hazard*, 10 Cal. App. 440, 102 P. 540; *contra, Galbreath v. Simas*, 161 Cal. 303, 119 P. 86.

Adverse Claim Cases.

As the government rarely initiates such proceedings the alien in contest with a citizen has therefore the same standing as the citizen *(Tornanses v. Melsing*, 109 F. 710, 47 C. C. A. 596) save only on application for patent and in suits supporting adverse claims, in which proceedings the government is an interested party and the citizenship of the parties becomes material.

If the parties to such suit are citizens the fact that the locator was an alien or that one of several locators was an alien or that intermediate holders were aliens becomes wholly immaterial.—*North Noonday M. Co. v. Orient Co.*, 9 M. R. 529, 530, 1 F. 522, 6 Sawy. 299; *Providence Co. v. Burke*, 6 Ariz. 323, 57 P. 641, 19 M. R. 625; *Gorman Co. v. Alexander*, 2 S. D. 557, 51 N. W. 346; *Billings v. Aspen Co.*, 52 F. 250, 3 C. C. A. 69; *Stewart v. Gold Co.*, 29 Utah 443, 82 P. 475.

The Citizenship of the Original Locator Is Material Only where he continues to be the claimant to the time of the institution of the adverse suit.

It is not even inquired into by the land office where patent is applied for by the grantee of the original locator. Notwithstanding the numerous holdings cited in the preceding

paragraph, the case of *Duncan v. Eagle Rock Co.*, 48 Colo. 569, 139 Am. St. Rep. 288, 111 P. 588, rules to the contrary.

Declaration of Intention.

One who has declared his intention to become a citizen of the United States may locate, enter and patent a claim the same as a citizen.

The Act of Naturalization Is Retroactive, So That if an alien had located a claim and afterwards became or declared his intention to become naturalized, his location is good from its original date.—*Osterman v. Baldwin*, 6 Wall. 122, 18 L. Ed. 730, 732, 29 L. D. 164; *Shea v. Nilima*, 133 F. 209, 66 C. C. A. 263.

In the last cited case a prospecting contract between two parties, both aliens, was enforced.

In the *Manuel* case a citizen had located and sold to an alien. The alien had applied for patent and was adversed. Pending trial he became naturalized, he being a minor immigrant entitled to take out papers without previous declaration of intention, and the Court held that the effect of naturalization was retroactive, made his claim valid and defeated the adverse.

Children of Aliens.

There is a common impression that the naturalization of the father operates to make citizens of all his children who came to the United States under twenty-one years of age; but this is the case only as to such children who were under that age at the date of the father's naturalization papers.—R. S. Sec. 2172, 34 St. L. 1229.

An Alien May Take Title by Descent and Hold the Claim against all the world except the United States.—*Billings v. Aspen Co.*, 51 F. 388, 2 C. C. A. 252, 52 F. 250, 3 C. C. A. 69; *Lohmann v. Helmer*, 104 F. 178.

Pleading and Proof of Citizenship.

Except in adverse claim cases it need be neither alleged nor proved.—*Harris v. Kellogg,* 117 Cal. 484, 49 P. 708; *Buckley v. Fox,* 8 Ida. 248, 67 P. 659; *Gruwell v. Rocca,* 141 Cal. 417. 74 P. 1028. It may be proved when essential though not averred.—*Altoona Co. v. Integral Co.,* 114 Cal. 100, 45 P. 1047. Where no issue is made on it, it can not be controverted.—*Jackson v. Dines,* 13 Colo. 90, 21 P. 918; *Sherlock v. Leighton,* 9 Wyo. 297, 63 P. 580, 934.

Indirect proof by circumstances has been allowed.—*Strickley v. Hill,* 22 Utah 257, 83 Am. St. Rep. 786, 62 P. 893, 20 M. R. 722, and in *Jantzon v. Arizona Co.,* 3 Ariz. 6, 20 P. 93. the broad view was expressed, and as we have always believed correctly expressed, that (in judicial as distinguished from departmental proceedings) a presumption exists in favor of the citizenship of a resident locator.

The point of alienage must be raised on the trial below.—*O'Reilly v. Campbell,* 116 U. S. 418, 420, 29 L. Ed. 669, 6 Sup. Ct. 421; *Dean v. Omaha Co.,* 21 Wyo. 133, 128 P. 881, 129 P. 1023.

Where a party is native born his own statement proves his citizenship. Where naturalization or declaration of intention is in issue the proper proof is the production of a certified copy of the record, but there are instances where this strictness is not insisted on.—*Wood v. Aspen Co.,* 36 F. 25; *Providence Co. v. Burke,* 6 Ariz. 323, 57 P. 641, 19 M. R. 625.

In the Land Office upon application for patent and upon adverse claim the proof is by affidavit and like proof is held good in the suit supporting the adverse.—*Hammer v. Garfield Co.,* 16 M. R. 125, 130 U. S. 291, 32 L. Ed. 964, 9 Sup. Ct. 548; *O'Reilly v. Campbell,* 116 U. S. 418, 420, 29 L. Ed. 669, 6 Sup. Ct. 421.

Citizenship of the stockholders of an American corporation need not be proved and issue can not be taken on this point. —*Doe v. Waterloo Co.,* 70 F. 455, 456, 17 C. C. A. 190, 18 M. R. 265.

The Federal Alien Acts Relating to Territories Have Now no force except in the Territory of Alaska. They add little or nothing to the general restrictions already noted, limiting the right to locate and purchase mining claims to citizens and declarants. 29 Stat. L. 618, Comp. Stats. (1911) p. 1168.

Chinese.

Idaho, Nevada and Oregon attempt restrictions on ownership by Mongolian aliens, but such discriminations are subject to treaties of the United States. A lease to Chinamen was held good in *Ah Kle v. McLean,* 3 Ida. 538, 32 P. 200.

MEXICAN GRANT.

The three cessions of Mexican territory to the United States were by the treaty of Guadaloupe Hidalgo, Feb. 2, 1848, the Gadsden purchase in 1853 and the grant by the State of Texas in 1850, of all its claims to territory outside of its present boundaries. It had been the policy of the Spanish and Mexican governments to allow the governors of the outlying provinces to pass title to large tracts for colonization purposes but limited to eleven square leagues. Such private cessions of land are recognized by all the treaties as well as by the modern law of conquest, and they have been variously confirmed by special acts, by patents, or by the adjudication of the Court of Land Claims. Many of the so-called grants were of an inchoate character—what we would call licenses or equities not ripened into grants proper. But whatever their status the United States is understood to be bound as fully as was the original government.

In *Moore v. Smaw,* 12 M. R. 418, 17 Cal. 199, 79 Am. Dec. 123, where the subject of mineral rights in grants was fully discussed, it was held that no interest in minerals passed by the grant of the Mexican government without express words

designating them and that at the date of the cession of California to the United States they were the property of the Mexican government and passed by the cession to the United States; but that a patent from the United States, in confirmation of such grant, making no reservation of the minerals, invested the patentee with the ownership of the minerals.

In *Fremont v. U. S.*, 17 How. (58 U. S.) 542, 565, 15 L. Ed. 241, 249, it was held that the discovery of gold or silver did not, under the mining laws of Mexico, destroy the title of the individual holding the grant to the surface, without passing upon the rights of the government or of the discoverer, in such minerals.

The *Moore case* followed without qualification in *Fremont v. Seals*, 11 M. R. 632, 18 Cal. 433, and *Ah Hee v. Crippen*, 10 M. R. 367, 19 Cal. 491, 492, remained for many years unquestioned, but in *U. S. v. San Pedro Co.*, 4 N. M. 225, 17 P. 337, the Supreme Court of New Mexico held that a confirmation of the grant by patent or statute did not pass the minerals. The facts in this case for the mineral claimant were very strong, as the mines on that grant had been, prior to the cession, of known value and denounceable, if not actually denounced under Mexican law.

A Mexican grant seems to be inadmissible as proof of title till confirmed by Act of Congress.—*Astiazaran v. Santa Rita Co.*, 3 Ariz. 20, 20 P. 189, 148 U. S. 80, 37 L. Ed. 376, 13 Sup. Ct. 457. But confirmation may be complete without patent.—*Shaw v. Kellogg*, 170 U. S. 312, 42 L. Ed. 1050, 18 Sup. Ct. 632. And the action of Congress is not subject to judicial review.—*Catron v. Laughlin*, 11 N. M. 604, 72 P. 26.

A mining location may be made on an unconfirmed Mexican grant. Such land is not reserved against entry.—*Lockhart v. Wills*, 9 N. M. 344, 54 P. 336, 19 M. R. 497; Aff'd *Lockhart v. Johnson*, 181 U. S. 516, 45 L. Ed. 979, 21 Sup. Ct. 665.

In *Gildersleeve v. New Mexico Co.*, a confirmed Mexican grant was upheld on the ground of laches of the complainant. —161 U. S. 573, 40 L. Ed. 812, 16 Sup. Ct. 663.

MINING CORPORATIONS, DOMESTIC.

A Corporation Is an "Association of Persons" within the meaning of the U. S. Mining Acts.—*U. S. v. Trinidad Co.*, 137 U. S. 160, 34 L. Ed. 640, 11 Sup. Ct. 57.

*Any three or more persons are authorized to file their certificate of incorporation under the Colorado Incorporation Act.—R. S. Secs. 845-999, for purposes of mining or construction of ditches or flumes; to run tunnels; or in fact "for any lawful purpose," but there are special provisions in the corporation chapter which refer only to mining, ore reduction, and tunneling companies—and other special provisions concerning ditch, flume and pipe line companies.—Secs. 988, 998.

Number of Directors.

By Act of 1915, p. 173, amending R. S. Colo. Sec. 865, the number of directors must not be less than three nor more than thirteen.

The Par Value of Shares May Be in Any Sum Provided for in the articles but can not exceed one hundred dollars, and the shares may be issued payable in instalments.—Sec. 850, *Acts of 1915*, p. 172.

The directors have power to sell the stock of the company at less than par.—*Mosher v. Sinnott*, 20 Colo. App. 454, 79 P. 742.

Rights of Stockholders.

Any stockholder has a right to inspect the books of the corporation.—Sec. 869. And the holders of fifteen per cent may demand a written statement.—Sec. 877.

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* These details vary in the several States, but each allows of incorporation upon practically the same terms and upon compliance with substantially the same forms as in Colorado. To state each instance where they vary would be beyond the plan and intended size of this work. Nor is it advisable even where the most complete local forms and directions are given in any book to attempt to write any such document as a corporate charter without professional counsel.

By statute in some States, stockholders may inspect the mine. Such a statute is construed in *Hobbs v. Tom Reed Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 P. 781.

The Term of Existence Can Not Exceed Twenty Years.—Sec. 847. But may be renewed.—Sec. 891.

Stock Paid in Lands.

Any such company may issue stock in payment for mines, such stock to be treated as paid-up stock.—Sec. 851.

Where stock is issued upon excessive over-valuation the holder may be held personally liable.—*Kelly v. Clark (Fourth Co.)*, 21 Mont. 291, 69 Am. St. Rep. 668, 42 L. R. A. 621, 53 P. 959, 19 M. R. 431; compare *DuPont v. Tilden*, 42 F. 87.

No personal liability is imposed upon stockholders for debts, except to the extent of unpaid stock held by them.—Sec. 873. Directors and officers become liable for failure to make and file an annual report; or for declaring fraudulent dividends. —Secs. 872, 911.

Sale to corporation of claims located without discoveries held to be without consideration and the stockholders personally liable.—*Buck v. Jones*, 18 Colo. App. 250, 70 P. 951, 22 M. R. 467. But this is not the decision of a Court of last resort and it overlooks the fact that a claim staked to cover the supposed extension of a blind lode or a placer claim carrying a heavy overburden may have real and even great pecuniary value, although not yet held by valid possessory title.

Annual Meetings of Stockholders Are Provided for by statute, the by-laws fixing the time and place. They can not be lawfully held out of the State.—*Jones v. Pearl M. Co.*, 20 Colo. 417, 38 P. 700.

The Colorado Act (1915 p. 173) requires notice to be published not less than 30 days previous to the meeting, in a

newspaper published where the principal office is kept, and thirty days' notice to each stockholder.

Mortgage.

In Colorado a mining company is forbidden to mortgage its property except by a majority vote of its stockholders.—Sec. 865.

The amendment of 1915, p. 173, allows a five years' lease without such assent. Before such amendment a lease for that period had been held an incumbrance under this section in *Westerlund v. Black Bear Co.*, 203 F. 599, 121 C. C. A. 627.

Other states have similar limitations. Either previous assent or subsequent ratification answers the demands of such statute.—*Lacy v. Gunn*, 144 Cal. 511, 78 P. 30; *Royal M. Co. v. Royal Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 P. 123. A party holding a mortgage without such assent or ratification has no standing in Court.—*Bennett v. Red Cloud Co.*, 14 Cal. App. 728, 113 P. 119. But only the stockholders can defend against a mortgage issued in violation of this provision.—*Firestone C. Co. v. McKissick*, 24 Colo. App. 294, 134 P. 147.

Corporate Deed.

The seal of the company is *prima facie* evidence that it was affixed by corporate authority.—*Union Gold M. Co. v. Bank*, 2 Colo. 226. To render a conveyance of real property unimpeachable it should be authorized by the board of directors, preceded by action of the stockholders at a meeting called for that purpose. But the deed may be valid without such minutes.—*Rubie Co. v. Princess Co.*, 31 Colo. 158, 71 P. 1121, 22 M. R. 569.

Seal.

A corporation may be bound by a scroll seal.—*G. V. B. Min. Co. v. First Nat. Bank*, 95 F. 23, 36 C. C. A. 633. And may adopt new seal when its president withholds the old one.—*Socorro Co. v. Preston*, 17 Misc. 220, 40 N. Y. Supp. 1040.

ARTICLES OF INCORPORATION—MINING COMPANY.

WHEREAS, *Arthur Howe Carpenter, Elbert F. Fitzgerald and Frank W. Howbert,* all of the City and County of *Denver,* State of *Colorado,* have associated themselves together for purposes of incorporation under the General Incorporation Acts of the State of Colorado, they do therefore make, sign and acknowledge these *duplicate* certificates in writing, which when filed, shall constitute the Articles of Incorporation of *The Yellow Bug Mining Company.*

ARTICLE 1. The name of said company shall be *The Yellow Bug Mining Company.*

ARTICLE 2. The objects for which said company is created are to acquire, hold, work and operate mines and lodes bearing gold, silver and other associated minerals in the County of San Miguel in said State of Colorado; and to acquire, own and use water, water rights and mills incident to the extraction, treatment and reduction of the ores of said metals and, from time to time, to sell and convey such mines, mills, water rights and ores, and to do all things incident to the general business of mining and to treat and market the product of the mines.

ARTICLE 3. The term of existence of said company shall be twenty years.

ARTICLE 4. The capital stock of said company shall be *one hundred thousand dollars* divided into *one hundred thousand shares* of *one* dollar each.

ARTICLE 5. The number of directors of said company shall be *three,* and the names of those who shall manage the affairs of the company for the first year of its existence are *Arthur Howe Carpenter, Elbert F. Fitzgerald* and *Frank W. Howbert.*

ARTICLE 6. The principal office of said company shall be kept at *Placerville* in said County and the principal business of said company shall be carried on in said County of *San Miguel.*

ARTICLE 7. The stock of said company shall be non-assessable, and cumulative voting of stock shall (not) be allowed.—*Act of 1915.*

ARTICLE 8. The board of directors shall have power to make such prudential by-laws as they may deem proper for the management of the affairs of the company, not inconsistent with the laws of this State, for the purpose of carrying on all kinds of business within the objects and purposes of such company.

In witness whereof, the said incorporators have hereunto set their hands and seals this *first* day of *January,* A. D. 1916.

ARTHUR HOWE CARPENTER. [SEAL.]
ELBERT F. FITZGERALD. [SEAL.]
FRANK W. HOWBERT. [SEAL.]

STATE OF COLORADO, City and County of *Denver:* ss.

I, *Duncan W. Miller,* a notary public in and for said County, do hereby certify that *Arthur Howe Carpenter, Elbert F. Fitzgerald* and *Frank W. Howbert,* who are personally known to me to be the same persons described in, and who executed the within duplicate Articles of Incorporation, appeared before me this day and personally acknowledged that they signed, sealed and delivered the same as their free and voluntary act and deed.

Witness my hand and notarial seal this first day of *January,* A. D. 1916. *Duncan W. Miller,*

[SEAL.] Notary Public.

My commission expires Oct. 1, 1917.

Where it is desired to transact part of the business out of the State the certificate must so state:

ARTICLE 9. A part of the business of said company shall be carried on in *Eckley,* County of *Luzerne,* Commonwealth of *Pennsylvania,* and the principal office of said company out of the State shall be at said *Eckley,* at which office meetings of directors may be held.

The first seven articles in the above form contain all of the statutory requirements. Article 8, in regard to the by-laws, is necessary if it is intended that the directors instead of the stockholders, shall make the by-laws.—R. S. Sec. 853.

One of the said duplicates is to be filed with the Recorder of the proper county, and one with the Secretary of State, and if the business is to be carried on in more than one county, the word *duplicate* should not be used, as there must be an original for each county as well as for the Secretary of State.

Assessable or Non-Assessable.

The statute provides for assessments upon shares, where by the charter the stock is made assessable, and requires that whether the stock shall be assessable or non-assessable shall be stated in the articles; and each certificate of stock "shall have plainly printed on the face thereof the word 'assessable' or 'non-assessable' as the case may be."

Where, after organization is complete, a company desires to extend its business into other counties, it may do so without amending charter, by filing certified copy from the Secretary of State's office with the Recorder of the new county.

On filing the articles a copy certified by the Secretary of State should be procured and preserved as the legal voucher for corporate existence. At the same time the Secretary of State issues his "Certificate of Authority" and thereupon should be called the organization meeting, to be attended by a majority of the original board of directors (by custom the same persons as the incorporators, though not necessarily so). This organization meeting, so-called, is really the first regular meeting of the board of directors, and at such meeting the articles filed should be formally accepted.

ORGANIZATION MEETING.

Record of the first meeting of the Board of Directors of *The Yellow Bug Mining Company*, at *Placerville*, Colorado, *January* 7, 1916.

At a meeting of the persons named in the articles of said company, there being present *Arthur Howe Carpenter, Elbert F. Fitzgerald* and *Frank W. Howbert*.

On motion *Arthur Howe Carpenter* was elected chairman and *Frank W. Howbert* secretary *pro tem.*

On motion the Articles of Incorporation as filed in the office of the Secretary of State and in the office of the County Clerk of *San Miguel* County, were accepted as the articles of incorporation, or charter of said company.

On ballot taken *Arthur Howe Carpenter* was elected president of the company, *Elbert F. Fitzgerald* was elected vice-president, *Frank W. Howbert* was elected treasurer, *Albert B. Roeder* was elected secretary, and *James A. Ownbey* was elected superintendent.

On motion the following by-laws were adopted:

BY-LAWS.

[The by-laws below will be found, in general, sufficient; but each by-law should be reviewed and such changes made as may be needed to cover special plans of the incorporators.]

I.—OFFICERS.

The officers of this company shall consist of a President, Vice-President, Secretary, Treasurer, and Superintendent, who shall be chosen by the Directors at their first meeting following the annual meeting of the stockholders in each year. They shall be elected from the Board of Directors, except the Secretary and Superintendent, who may or may not be Directors. Said officers shall hold their respective offices until their successors are appointed and enter upon the duties of their offices.

Vacancies among the Directors may be filled at any meeting of the Board of Directors, by ballot.

II.—DUTIES OF PRESIDENT.

It shall be the duty of the President to preside at all meetings of the Directors, and to sign all bonds, deeds, agreements or other instruments in writing, made or entered into by or on behalf of the corporation; to sign all certificates of stock, and all orders for money on the Treasurer, and in general perform all acts incident to his office.

III.—DUTY OF VICE-PRESIDENT.

It shall be the duty of the Vice-President to perform all such functions as belong to the office of President in the absence of the President.

IV.—DUTIES OF SECRETARY.

The Secretary shall give due notice of all meetings of stockholders, and of the Board of Directors; shall prepare and keep proper books of record and of account for the business of the company, and such other books as may be required by law or the Directors may prescribe. He shall countersign and register all certificates of stock, and other documents requiring the signature of the President, attaching the corporate seal of the company to all instruments requiring seal, and perform all such other duties as are incident to his office. A suitable compensation, to be determined by the Directors, shall be allowed the Secretary for his services. He shall be the custodian of the corporate seal.

V.—DUTIES OF TREASURER.

The Treasurer shall be the custodian of the funds until the same be disposed of by order of the Board of Directors. He shall give bond satisfactory to the Board of Directors, for the faithful performance of his duties. No money shall be paid out by the Treasurer except on the order of the President or Superintendent, countersigned by the Secretary.

VI.—DUTIES OF SUPERINTENDENT.

The Superintendent shall have control of the working and developing of the company's mining property; shall report to the Board of Directors, for their approval, all contemplated work, and after such approval, shall have full power to contract said work. All expenses incurred by the Superintendent in the working and management of the company's property shall be borne by the company. A suitable compensation, to be determined by the Board of Directors, shall be allowed him for his services.

VII.—BOARD OF DIRECTORS.

The Board of Directors shall consist of *three* members, always including the President, Vice-President and Treasurer. It shall be the duty of the Board to exercise general supervision over the affairs of the company;

to receive and pass upon the reports of the Secretary, Treasurer and Superintendent, to audit all bills and accounts against the company, and to direct the Secretary in correspondence.

VIII.—ANNUAL REPORTS.

The Board of Directors shall cause its officers to make a full exhibit of their several departments and to prepare reports for submission to the annual meeting of stockholders.

IX.—DIRECTORS' MEETINGS.

The Board of Directors shall meet at such times as they shall from time to time determine, and a meeting of the Board may at any time be called by the President or any two members of the Board by causing personal notice to be served upon the Directors at least one day before the date of such proposed meeting. *Two* of the Directors shall constitute a quorum for the transaction of business. All Directors and officers must be stockholders.

X.—STOCKHOLDERS' MEETING.

The first annual meeting of the company shall be held at the office of the company at Placerville, at 10 o'clock A. M., on the second *Tuesday* in *January*, A. D. 1916, and on the same Tuesday of each succeeding year. If omitted, the Directors shall hold over until their successors are appointed. Special meetings may be called by the Board of Directors, or by one-tenth in amount of all the stock held. Such published notice and personal notice by mail as may be required by law, shall be given of each meeting (except adjourned meetings) and the object of the meeting shall be stated in the notice. Stockholders may be represented by proxies, which must be exhibited for inspection to the meeting.—*See Sec. 865. Amended 1915, p. 173.*

XI.—CERTIFICATE OF SHARES.

The subscribers to the capital stock of this company shall be entitled to certificates of their shares, duly signed by the President and countersigned by the Secretary. The certificates of stock shall be numbered and registered as they are issued. Transfers of stock shall only be made on the books of the company, either in person or by attorney, and the possession of stock shall not be regarded as evidence of ownership of the same, unless it appears upon the stock books of the company that said certificate was issued or duly transferred to the holder of the same.

XII.—DEBTS.

No debt shall be contracted against the company except by order of the Board of Directors.

XIII.—DIVIDENDS.

Dividends shall be made not in excess of the net earnings of the company at the close of every fiscal year, which shall be on the thirty-first day of December of every year; or oftener as the Board of Directors may see fit.

XIV.—CORPORATE SEAL.

This company adopts as its corporate seal, the device described as follows: A pick and shovel crossed, surrounded by the name of the company.

XV.—AMENDMENTS.

These by-laws may be changed, amended or revoked at any time, by a two-thirds vote of the Board of Directors.

The charter and by-laws being adopted, and the officers elected, the organization of the corporation is complete, and the minutes proceed to note business as it may be transacted.

Reports and Certificates Required.

After payment of the last instalment of capital stock the president and a majority of the board of directors are required by Sec. 875 to record a certificate in the office of the Secretary of State as follows:

CERTIFICATE OF FULL PAID STOCK.

STATE OF COLORADO, County of *San Miguel:* ss.

The undersigned, *Arthur H. Carpenter,* President, and *Elbert F. Fitzgerald,* Director, constituting a majority of the Directors of *The Yellow Bug Mining Company,* do hereby certify, in accordance with Section 875 of the Revised Statutes of said State, that the amount of the capital stock of said company, as fixed and limited by its Articles of Incorporation, is $100,000, and that the whole amount of said stock has been paid in. That $10,000 thereof was paid in cash and $90,000 was paid for by the purchase of mining property.

Witness our hands this 5th day of *February,* A. D. 1916.

ARTHUR H. CARPENTER, President.
ELBERT F. FITZGERALD, Director.

STATE OF COLORADO, County of *San Miguel:* ss.

Arthur H. Carpenter and *Elbert F. Fitzgerald,* being duly sworn, say that they are the officers named in the foregoing certificate, and constitute a majority of the Board of Directors of said company; that they have heard said certificate read and know the contents thereof, and that the matters and things therein stated are correct and true.

ARTHUR H. CARPENTER.
ELBERT F. FITZGERALD.

Sworn and subscribed before me this *fifth* day of *February,* A. D. 1916.

Curtis L. Greenwood,
[SEAL.] Notary Public.

My commission expires May 1, 1917.

A *copy* of said certificate is also to be filed and recorded in the Recorder's office of each county where business is done.

It is held that when the capital stock is fully paid up it is the duty of the officers to made and record such certificate.—*Austin v. Berlin,* 13 Colo. 198, 200, 22 P. 433.

Annual Report.

By Colorado R. S. Sec. 911 an annual report is required of all corporations to be filed within sixty days from January 1. The penalty for failure to file is personal liability of all officers and directors. Special details are demanded of mining and ditch companies which are scheduled in printed blanks furnished on request from the Secretary of State's office.

Such report must be signed by the president and verified by the president and secretary and the corporate seal attached.

Where the stock has been paid up by purchase of the mine, the certificate must so state.

ARTICLES OF INCORPORATION—DITCH COMPANY.

(Preamble same as p. 396.)

ARTICLE 1. The name of said company shall be "The *Deluge* Ditch Company."

ARTICLE 2. The objects for which said company is created are to construct a ditch and keep and maintain the same *from the stream known as Roaring Fork of the Grand, tapping such stream at a point about one-quarter mile above the Jones ranch, and about one hundred yards below Eagle Cliff, and fifty feet northeast from lone pine tree blazed D. D.; the line of said ditch running thence (give course and distance of survey if possible, so as to describe "the line of said ditch as near as may be").* The water of said ditch to be used and sold for placer mining.

ARTICLES 3, 4, 5, 6, 8 and 9 and acknowledgment (same form as on p. 396.)

ARTICLE 7. The stock of said company shall be assessable, upon majority vote at stockholders' meeting, as required by law.

The stream tapped, head of ditch, line of ditch and intended use of water must always be stated; also the location of the reservoir if a reservoir is to be constructed.

Any surplus water they are compelled to keep for sale, at rates fixed by County Commissioners.

SMELTING AND ORE-SAMPLING COMPANIES.

The following Articles stating the purposes of organization are taken from records filed by operating companies. The other Articles for such or other like companies should be substantially in the above form, always observing that the article (No. 7) referring to assessability of stock, and the requirement to print "Assessable" or "Non-Assessable" on the face of the stock certificate is confined to ore-reducing, mining and tunneling companies.—Sec. 975.

(The Pueblo Smelting and Refining Company.)

ARTICLE 2. The objects for which the said company hereby formed is created shall be: To buy and sell ores, metals and other furnace products; to smelt and reduce lead, gold, silver, copper and other ores, and refine bullion; manufacture lead, copper and iron products and articles of merchandise, and do a general smelting, refining and metallurgical business; to erect necessary buildings, mills, machinery and appliances; purchase materials for the proper working thereof; and do any and all other things necessary, proper or requisite to carry into effect the objects aforesaid.

(The Omaha and Grant Smelting and Refining Company.)

ARTICLE 2. The nature of the business to be transacted shall be:

1st.—The purchase, lease, erection and operation of smelting and refining works, and the smelting and refining therein of gold, silver, and other valuable ores and metals.

2nd.—The purchase, lease and operation of mines and mining property, for the purpose of obtaining said gold, silver and other valuable ores.

3rd.—The purchase of gold, silver and other valuable ores and metals for smelting and refining, and the sale and disposal of the products thereof.

4th.—To acquire by donation, purchase, lease, or otherwise real or personal property of any kind, and to use, maintain, enjoy, and dispose of the same for the benefit of said corporation.

(The Taylor & Brunton Ore Sampling Company.)

ARTICLE 2. The objects for which said company is created are to acquire, hold and operate mills and works at and near Aspen, in said County of Pitkin, for the crushing, sampling and testing of mineral-bearing ores; and to buy, sell, assay, hold, store, ship and deal in such ores and their products on its own account, and as factor or agent for others; and to do all things incident to the general business of maintain-

ing and operating such mills and works, and dealing in all kinds of mineral-bearing ores and the products and proceeds thereof.

Filing Fees—Domestic Corporations.

On filing its Articles in the office of the Secretary of State each domestic corporation is required to pay $20 for the first $50,000 of its capital stock and 20 cents for each additional $1,000 of stock.

For Certificate of Authority, $5.

Filing impression of seal, $2.50.

On filing of certificate of paid up stock, $2.50, plus 5 cents for each $1,000 of stock in excess of $50,000.

On increase of capital, 20 cents for each $1,000.

Amendment of articles, $5.

Change of name, $25.

Filing Fees—Foreign Corporations.

$30 for the first $50,000 of its capital stock, and 30 cents for each additional $1,000 of stock.

Certificate of Authority, $5.

Filing impression of seal, $2.50.

Copy of law under which organized, $5.

Designation of agency, $5.

Filing certificate of paid up stock; same as for domestic corporation, *supra.*

On increase of capitalization, 30 cents for each $1,000.

Amendment of Articles, $5.

Change of name, $25.

License Tax.

By the Revenue Act of 1907 all corporations, domestic or foreign, are charged an annual license tax of two cents upon each $1,000 of their capital stock. The tax is payable to the Secretary of State on or before May 1st. The penalty for

failure to pay the tax is a forfeiture of the right to do business in the State, besides an addition of one-tenth to the tax for each six months' default. This tax, as originally imposed in 1902, discriminated against foreign corporations by assessing them at a greater percentage, and was declared void by *American Sm. Co. v. Lindsley,* 204 U. S. 103, 51 L. Ed. 393, 27 Sup. Ct. 198, 9 Ann. Cas. 978, whereupon the act was amended as above, taxing both sorts equally, so that it is now doubtless valid as to both classes.—34 Colo. 240, 82 P. 531.

Assessments on Stock.

By R. S. Secs. 978, 980, 981, provisions are enacted for the assessment of shares of companies whose stock is made assessable under the charter or "by the laws of this State." The assessment is to be made by action of the board of directors by a majority vote, notice of meeting being first given to each director. No greater assessment than 10 per cent can be made at one time, and a second assessment must not be within thirty days after date of sales under the previous assessment.

The assessment is made payable "immediately," and if unpaid after thirty days is considered delinquent and may be advertised for thirty days in a daily paper published at the place of the chief office of the company, and also in a daily paper published where the mine is located (with provisions for cases where daily papers are not published).

If not paid within twenty days "from the date the same became delinquent," the secretary is empowered to sell the shares at public auction in front of the chief office of the company to the highest bidder for cash.

The Act further requires notice to be sent to each stockholder, informing him of the assessment.

Almost every Colorado mining company issues only nonassessable stock, but it is not certain that such stock when not paid for to its face value can not be assessed up to such value, and until such value has been paid, under the terms of Sec. 850. See *A. Leschen Co. v. Allen,* 187 F. 977, 110 C. C. A. 315.

The procedure to make formal assessment, under the terms of the three sections above cited together, is slow and complicated, and much of the wording of the act is inconsistent with other clauses. But they do not seem to apply to assessments of installments of purchase price.

Resolution to Assess.

Resolved, That an assessment, to be styled Assessment No. 1, of 5 per cent, is hereby levied and made upon each and every share of the capital stock of this corporation, The Vanadis Mining Company, payable immediately, at the office of the company, to Jean Francis Webb, the treasurer.

NOTICE OF ASSESSMENT.

Office of

THE VANADIS MINING COMPANY,

No. 777 Stout Street, Denver, Colorado.

January 3, 1915.

Brinton Gregory, Stockholder:

You are hereby notified that at a regular meeting of the board of directors of The Vanadis Mining Company, this day held at the office of said company, by a majority vote of all the directors, notice of such meeting having been first given to each director, there was levied and assessed upon each and every share of the capital stock of said company 5 per cent of the par value of such stock; such 5 per cent amounting to $25 on your five hundred shares of stock, payable immediately to Jean Francis Webb, the treasurer, at this office, address above given; and that such assessment, if not paid on or before the 2nd day of February, 1915, will be delinquent, and your stock, or so much thereof as may be necessary to pay the assessment and cost of advertising, will be sold, the sale to take place on April 2, 1915, at the hour of 10 o'clock A. M., as will be stated in the notice of sale.

GEORGE NOLAN,
Secretary.

Notice of Assessment.

The subject is further considered in Morrison's Corporation Manual, 2nd Ed., P. 189, which gives the form of advertisement of sale on delinquent stock. It is doubtful whether a by-law calling for forfeiture of delinquent mining stock instead of the sale provided in the statute would be valid.

Irregular Action.

A company which has habitually neglected all formalities can not plead the want of them to escape liability.—*G. V. B. Min. Co. v. First Nat. Bank,* 95 F. 23, 36 C. C. A. 633. So held where it allowed one director to assume entire management.—*Robinson Co. v. Johnson,* 10 Colo. App. 135, 50 P. 215. A resolution of the Board is not necessary to bind the company where it has had value received with knowledge.—*McKenzie v. Poorman Mines,* 88 F. 111, 112, 31 C. C. A. 409.

Where a corporation allows its president and general manager to practically control its business it is liable on a note given by such officer.—*McKinley v. Mineral Hill Co.,* 46 Wash. 162, 89 P. 495.

A company note to which defendants added their signatures as trustees may be shown to be the debt of the corporation alone.—*Knippenberg v. Greenwood M. Co.,* 39 Mont. 11, 101 P. 159.

Powers of President and Other Officers.

The president of a company has the power to do what is incidental to his office. All other acts must be authorized by the board of directors.—*Cushman v. Clover Land Co.,* 170 Ind. 402, 127 Am. St. Rep. 391, 16 L. R. A. (N. S.) 1078, 84 N. E. 759.

The secretary of the company has no power, by virtue of that office, to contract for the company, but the secretary may be made the company's agent, and his acts then bind it.—*Ross Oil Co. v. Eastham,* 73 Kan. 464, 85 P. 531. The same as to its president.—*Wood v. Saginaw Co.,* 20 S. D. 161, 105 N. W. 101.

The president and secretary alone have no right to appoint a general agent.—*Johnson v. Sage,* 4 Ida. 758, 44 P. 641.

Powers of Agents and Managers.

Parties dealing with general agents of foreign corporations have the right to assume that he has full powers.—*Rathbun v.*

Snow, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379. Superintendent has right to buy current supplies.—*Stuart v. Adams*, 89 Cal. 367, 26 P. 970.

May offset collection against wages.—*Hood v. Hampton Co.*, 106 F. 408. Principal can not accept benefits and repudiate agency.—*Genter v. Conglomerate Co.*, 23 Utah 165, 64 P. 362; *Barnard v. Roane Co.*, 85 Tenn. 139, 17 M. R. 94, 2 S. W. 21.

No authority to sell the future product of the mine; agent had contracted for more than the mine could produce.—*Blackmer v. Summit Co.*, 187 Ill. 32, 58 N. E. 289. Persons dealing with an agent when agent's authority is in writing are bound to take notice thereof.—*Id.*

Mine manager has no power to bind the corporation for medical services to injured employees.—*Spelman v. Gold Co.*, 26 Mont. 76, 91 Am. St. Rep. 402, 55 L. R. A. 640, 66 P. 597. But see *Mt. Wilson Co. v. Burbridge*, 11 Colo. App. 487, 53 P. 826.

A mine manager can not in general borrow money or pledge the credit of his company.—*Hawtayne v. Bourne*, 1 M. R. 285, 7 M. & W. 595; *Breed v. First Nat. Bank*, 1 M. R. 467, 4 Colo. 481; *Cons. Gregory Co. v. Raber*, 1 M. R. 405, 1 Colo. 511. An agent of two companies has the right to exchange supplies.—*Adams Co. v. Senter*, 1 M. R. 241, 26 Mich. 73. An agency for the care of property may be both created and proved by parol.—*Hardenbergh v. Bacon*, 1 M. R. 352, 33 Cal. 356.

The appointment of an agent for a corporation to make a contract for work and labor need not be made under seal or by resolution of the board.—*Crowley v. Genesee Co.*, 4 M. R. 71, 55 Cal. 273. Agent can not act for both parties without their consent.—*Finnerty v. Fritz*, 1 M. R. 437, 5 Colo. 174.

General powers of superintendents, or general agents in charge of mine, will be recognized without proof, as covering all the ordinary local business of the concern, and persons dealing with them have a right to assume this, unless otherwise notified.—*Adams Co. v. Senter*, 1 M. R. 241, 26 Mich. 73. General power of attorney implies no power to make promis-

sory note.—*Washburn v. Alden,* 1 M. R. 320, 5 Cal. 463. The general manager has the power to hire and to discharge a superintendent.—*Manross v. Uncle Sam Co.,* 88 Kan. 237, Ann. Cas. 1914B, 827, 128 P. 385.

Incorporators, Promoters, Prospectus.

Incorporators are liable for preliminary expenses.—*Hersey v. Tully,* 8 Colo. App. 110, 44 P. 854. See *Hecla Co. v. O'Neill,* 65 Hun 619, 19 N. Y. Supp. 592; *Winters v. Hub Co.,* 57 F. 287.

And the company may be held for the contracts of its promoters without formal adoption of the same by resolution of the board.—*Possell v. Smith,* 39 Colo. 127, 88 P. 1064.

Stock sales induced by the false statements of a prospectus and the conduct of the promoters will be set aside and the decree will go against the company itself and the guilty officers and promoters. The case fully defines what constitutes a promoter.—*Cox v. National C. Co.,* 61 W. Va. 291, 56 S. E. 494.

Vendors are not responsible for the false statements contained in the prospectus issued by the purchasing company.—*Wiser v. Lawler,* 189 U. S. 260, 47 L. Ed. 802, 23 Sup. Ct. 624, 22 M. R. 630.

Compensation to Officers—Commissions.

Corporate officers may recover on a *quantum meruit* for services in excess of their official duties.—*Gumaer v. Cripple Creek Co.,* 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 P. 81; *Severson v. Bimetallic Co.,* 18 Mont. 13, 44 P. 79; *Felton v. West Co.,* 16 Mont. 81, 40 P. 70; *Ruby Co. v. Prentice,* 25 Colo. 4, 52 P. 210. But must prove an express contract to recover for the usual official services.—*Du[illegible] Montana Co.,* 192 F. 714.

And a binding contract to pay for such services may be proved without showing a resolution of the board to such effect.—*In re Gouverneur Co.,* 168 F. 113.

An agent acting in bad faith forfeits commissions.—*Williams v. McKinley*, 65 F. 4.

Fraudulent Organization and Stock Sales.

A company may sue its organizers where the real price paid is less than that represented to the stockholders.—*Pittsburg Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149, 17 M. R. 226. Acts of directors distinguished from acts of the company.—*Summerlin v. Fronteriza Co.*, 41 F. 249. *Bona fide* holder of stock issued on over valuation not liable to creditors.—*Du Pont v. Tilden*, 42 F. 87.

A corporation may be held in equity to refund price of stock sold on fraudulent prospectus and fraud of its promoters.—*Cox v. National C. & Oil Co.*, 61 W. Va. 291, 56 S. E. 494.

Inexperienced persons buying stock have a right to rely upon the statements of the promoters, and a purchaser has his action where they falsely asserted that the mine was free from debt.—*Tinker v. Kier*, 195 Mo. 183, 94 S. W. 501.

Company presumed to know the fraud of its agents.—*Argentine Co. v. Benedict*, 18 Utah 183, 55 P. 559.

Distinction stated between treasury and promotion stock under Nevada Act of 1909.—*State v. Manhattan Co.*, 32 Nev. 474, 109 P. 442.

Fraud Against the Company.

Directors are liable to account for any secret profit made in the promotion of a company.—*Wills v. Nehalem C. Co.*, 52 Or. 70, 96 P. 528.

Where directors deal with and make profit out of their corporation the burden is on them to show that the transaction was fair and open.—*Barker v. Montana Co.*, 35 Mont. 351, 89 P. 66.

Where mining property is located or purchased by an officer of the corporation his liability to the company depends

upon whether or not he has been guilty of a breach of trust.—*Calumet Co. v. Phillips*, 31 Colo. 267, 72 P. 1064, 22 M. R. 677; *Lagarde v. Anniston Co.*, 126 Ala. 496, 20 M. R. 545, 28 So. 199.

The manager's knowledge of value—of ore shoots discovered in the mine—is the property of his company.—*Clark v. Buffalo Hump Co.*, 122 F. 243, 58 C. C. A. 607, 22 M. R. 672.

Complaint held good where a stockholder charged the company with attempt to depress the value of the stock and of intention to not perform the annual labor and relocate the company's claims.—*Glover v. Manila M. Co.*, 19 S. D. 559, 104 N. W. 261.

Where an agent bought a mine for $40,000 less than the price he represented to his principal, judgment for that amount was upheld regardless of the fact that the agent did not get the entire $40,000 himself.—*Great Western Co. v. Chambers*, 155 Cal. 364, 101 P. 6.

The agent of a mining company bought in its property at tax sale. The company refused to refund or redeem, and after several years' time and large expenditure a rich body of ore was struck in the mine. *Held*, that there was no trust and no equity in the company.—*Steinbeck v. Bon Homme M. Co.*, 152 F. 333, 81 C. C. A. 441.

Reorganization—Succession.

Where a new company is formed with same stockholders or other like suspicious incidents it is but a successor and liable for the debts and covenants of the old one.—*Higgins v. California Co.*, 122 Cal. 373, 55 P. 155, 147 Cal. 363, 81 P. 1070.

Mine in Charge of Receiver.

Where plaintiff improperly secures the appointment of a receiver of a mine, he may be charged with costs in excess of any fund liable for them.—*Hendrie & B. Mfg. Co. v. Parry*, 37 Colo. 359, 86 P. 113.

The practice of issuing receiver's certificates to operate a mine under prior secured indebtedness, condemned, except within certain close limitations.—*International Trust Co. v. Decker Bros.*, 152 F. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152.

A receiver has no authority to carry on mining unless so directed by the Court, and the Court has no power to allow his expense account to cut out a prior lien.—*Dalliba v. Winschell (Riggs)*, 11 Ida. 364, 114 Am. St. Rep. 267, 82 P. 107; *Hendrie & B. Co. v. Parry, supra.*

A party who secures the appointment of a receiver, and at whose instance the mine is worked at a loss is personally liable for the deficit.—*Harrington v. Union Oil Co.*, 144 F. 235; *Hendrie & B. Co. v. Parry, supra.*

The receiver should pay for use of tools used by him in operating oil wells.—*Midland Oil Co. v. Turner*, 179 F. 74, 102 C. C. A. 368.

A receiver is entitled to compensation out of the fund to be ultimately chargeable against the losing party.—*Doddridge Co. v. Smith*, 173 F. 386.

On behalf of minority stockholders, a receiver may be appointed where the mine has been collusively operated to the benefit of a hostile company.—*Ames v. Goldfield Co.*, 227 F. 292.

Taking possession of mine under color of process by collusion with the Court itself considered with judicial condemnation of such high-handed proceedings.—*Tornanses v. Melsing*, 106 F. 775, 45 C. C. A. 615.

Amendment of Articles.

This subject in Colorado is regulated by the Act of 1907.—R. S. Secs. 878-886. A meeting of stockholders must be called for on 30 days' notice, and two-thirds must assent to the amendment.

Dissolution.

Provision is made for the dissolution of solvent corporations desiring to go out of business, by the publication and filing of notices, without judicial action thereon.—R. S. Sec. 895.

For consideration of the rights of stockholders when the company has quit business and has no known board of directors, see *Tennessee Co. v. Ayers* (Tenn.), 43 S. W. 744.

A mining or quarry company comes within the provisions of the Bankruptcy Acts.—*In re Mathews C. Slate Co.*, 144 F. 724; *Burdick v. Dillon*, 144 F. 737, 75 C. C. A. 603; *In re Quincy G. Q. Co.*, 147 F. 279.

FOREIGN CORPORATIONS.

A corporation has no recognized existence except by comity outside of the State of its organization. It is, however, always allowed to do business elsewhere by complying with certain statutory conditions for the protection of local creditors, such conditions usually including that it file a copy of its articles with the Secretary of State and with the County Recorder of the place where it is intended to carry on its mining operations or other principal business, and that it designate a local agent upon whom process may be served.

Such conditions for Colorado are: That it file a copy of its charter in the office of the Secretary of State, or if "incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified and authorized by the proper authority of such foreign State, Kingdom or Territory."

That it file with the Secretary of State and in the office of the County Recorder a certificate designating its principal place of business and designating an agent residing at such principal place of business upon whom process may be served. —Secs. 916, 917.

A failure to comply with either of the above requirements imposes personal liability on its officers, agents and stockholders for the debts of the company.

It must receive from the Secretary of State a certificate that all the filing fees and taxes have been paid, commonly called a certificate of authority.—Sec. 910.

DESIGNATION OF PROCESS AGENT.

STATE OF NEW YORK, County of *New York:* ss.

It is hereby certified, That the *Mohawk Mining Company*, a corporation organized under the laws of said State, doth hereby designate that the "principal place where the business of such corporation shall be carried on in the State of Colorado," is *Central City*, County of *Gilpin*, State of Colorado, and that *Henry C. Becker*, residing at said principal place of business, is the authorized agent of said company, upon whom process may be served.

Witness the corporate name and seal of said company, and the signatures of its President and Secretary, this 3d day of *February*, A. D. 1916.

MOHAWK MINING COMPANY,
[SEAL.] J. BRISBIN WALKER, President,
CLARENCE CARY, Secretary.

STATE OF NEW YORK, County of *New York:* ss.

I, *Herbert E. Dickson* (195 Broadway), Commissioner of Deeds of the State of Colorado, duly commissioned and sworn, in and for said County, do hereby certify that *J. Brisbin Walker*, President, and *Clarence Cary*, Secretary, of the within named corporation, who are personally known to me to be such President and Secretary of said corporation, personally appeared before me this day, and acknowledged the within Instrument (in duplicate) to be their free and voluntary act and deed, and the free and voluntary act and deed of said corporation.

Witness my hand and official seal this 3d day of *February*, A. D. 1916.
[SEAL.] *Herbert E. Dickson*,
Commissioner of Colorado.

One copy of the above instrument must be filed with the Secretary of State, and one in the office of the Recorder of the proper county.

Designation by title of office was held good where a corporation had stated that its "general manager" should be its process agent.—*Goodwin v. Colorado Co.*, 110 U. S. 1, 28 L. Ed. 47, 3 Sup. Ct. Rep. 473.

Discriminations Against Foreign Corporations.

Besides the above special requirements it is declared that they "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed on" domestic corporations. Where they mortgage their property they must give public notice so that prior creditors may protect themselves. They must file annual reports the same as domestic companies. And the re-organization or liquidation of foreign companies to the prejudice of local shareholders is attempted to be prohibited. —R. S. Secs. 911, 917, 920.

Domestic Charter Preferable.

The provisions of the above and like statutes in other States, together with the fact that a foreign corporation is liable to attachment for debt as a non-resident, and must file special security for costs where a plaintiff, render a domestic organization preferable in most cases.

In Colorado the incorporators are not required to be citizens or residents of the State.—*Humphreys v. Mooney*, 4 M. R. 76, 5 Colo. 282.

TENANTS IN COMMON.

Right to Work the Mine.

Two or more persons owning undivided interests in mining ground are tenants in common, but unless working it together by agreement are not partners.

At common law each could work without accounting to the other. This was changed by the Statute of 4 Anne Ch. 16, Sec. 27.

Most States have adopted the tenor of that statute, to-wit: That the excluded co-tenant may have his proper action for his share of the proceeds of the working.

When any such statute has been enacted giving the right to an account and taking away the common law right of each to

work at his own risk but to his own exclusive profit, the law seems to be:

That any co-tenant may work the common property, at his own risk if he works to a loss, but must account to his co-tenants if he works to a profit.

Where a single co-tenant works a mine he can not demand contribution from those not working, but if pay ore is taken out he can deduct their proper share for all expenditures which improve the value of the mine or lead to the discovery of ore, but not for the expenses of unsuccessful prospecting.—*Wolfe v. Childs*, 42 Colo. 121, 126 Am. St. Rep. 152, 94 P. 292.

The owner of the majority interest may, by statute in Idaho, work the mine, but may not exclude the minority from access to the property.—*Sweeney v. Hanley*, 126 F. 97, 61 C. C. A. 153.

Where the minority works, the majority may direct the management.—*Hawkins v. Spokane Co.*, 3 Ida. 241, 28 P. 433, 3 Ida. 650, 33 P. 40.

No pay for time nor compensation for lost profits, barring exceptional instances, is allowed one against the other.—*Wolfe v. Childs, supra; Uncle Sam Co. v. Richards*, (Okla.) 158 P. 1187.

Measure of Damages on Accounting.

The measure of damages adopted has not been uniform. The rental value of the premises was allowed in the leading case of *Early v. Friend*, 16 Grat. 21, 78 Am. Dec. 649, 14 M. R. 271.

The value of the coal in place was allowed in *McGowan v. Bailey*, 179 Pa. 470, 36 Atl. 325.

"What is just and equitably due" is the measure of accounting under Pennsylvania Statute.—*Fulmer's Appeal*, 128 Pa. 24, 15 Am. St. Rep. 662, 18 Atl. 493. See full note to the case as reported in 17 M. R. 246.

Another line of cases allows full share of the profits, which is not a just rule where a plaintiff has assumed none of the

risks.—*Williamson v. Jones,* 43 W. Va. 562, 64 Am. St. Rep. 891, 38 L. R. A. 694, 27 S. E. 411, 19 M. R. 19; *Job v. Potton,* L. R. 20 Eq. 84, 14 M. R. 329.

Where the entire property is leased by one co-owner at a fixed royalty the measure of damages is plaintiff's proportion of the royalty.—*Cecil v. Clark,* 49 W. Va. 459, 39 S. E. 202.

The co-tenant is entitled to his share of the profits, but where defendant has worked to a loss plaintiff is not entitled to any recovery.—*Edsall v. Merrill,* 37 N. J. Eq. 114; *McCord v. Oakland Co.,* 64 Cal. 134, 27 P. 863, 49 Am. Rep. 686.

In Illinois a single co-tenant working the mine was treated as a trespasser in *Murray v. Haverty,* 70 Ill. 318, 14 M. R. 325. And the law of Montana as to co-tenants was construed with almost equal severity in *Anaconda Co. v. Butte Co.,* 17 Mont. 519, 43 P. 924; *Red Mountain Co. v. Esler,* 18 Mont. 174, 44 P. 523.

In *Dettering v. Nordstrom,* 148 F. 81, 78 C. C. A. 157, defendant suffered a harsh judgment and was not allowed expenses on technical points of pleading and evidence.

One co-tenant may work the whole mine, but must account to his co-tenant for profits. He is not deprived of the right to deduct expenses by the fact that he intended to keep all the proceeds, nor can he be punished with compound interest for such intent.—*Silver King Co. v. Silver King Co.,* 204 F. 166, 122 C. C. A. 402.

As to what is sufficient proof of co-tenancy, see *Costello v. Cunningham,* 16 Ariz. 447, 147 P. 701.

Relations to the Common Title.

A relocation by one operates for the benefit of all, even if made unknown to the others, and with a change of name of the claim.—*Van Wagenen v. Carpenter,* 27 Colo. 444, 445, 61 P. 698. See p. 156.

A tax title acquired by one of the co-tenants enures to the benefit of all.—*Moragne v. Doe,* 143 Ala. 459, 111 Am. St. Rep. 52, 5 Ann. Cas. 331, 39 So. 161.

Possession by a co-tenant is not adverse without notice to the co-tenant out of possession that his title is denied.—*Rich v. Victoria Co.*, 147 F. 380, 77 C. C. A. 558. And where the mineral and surface estates have been severed the possession of the surface owner is not possession of the minerals.—*Manning v. Kansas Co.*, 181 Mo. 359, 81 S. W. 140.

They may deal with each other as with strangers as to their respective interests in the common property.—*Bissell v. Foss*, 114 U. S. 252, 29 L. Ed. 126, 5 Sup. Ct. Rep. 851; *Lichtenberger v. Newhouse*, 41 Utah 22, 123 P. 624. But they can not collude with one another or with strangers to deprive a co-tenant of his full share of purchase money. See citations, p. 355. A co-tenant is not bound to reveal his knowledge of mineral value when purchasing the interest of his associate.—*Richardson v. Heney* (Ariz.), 157 P. 980.

A co-tenant may not use the common property through which to work other property in which his co-owner has no interest.—*People v. District Court*, 20 M. R. 734, 27 Colo. 465, 62 P. 206; *Butte Co. v. Montana Co.*, 24 Mont. 125, 60 P. 1039; *Laesch v. Morton*, 38 Colo. 171, 120 Am. St. Rep. 106, 87 P. 1081.

INDIAN RESERVATION.

An Indian reservation is not a part of the public domain open to exploration, or occupation, and a valid mining location can not be made upon it.—*French v. Lancaster*, 2 Dak. 346, 47 N. W. 395; *Gibson v. Anderson*, 131 F. 39, 65 C. C. A. 277. Nor can both parties waive the point.—2 Dak. 346, 47 N. W. 395. An attempted location made before the extinguishment of the Indian title must yield to one made after its purchase. —*Kendall v. San Juan S. M. Co.*, 9 Colo. 349, 12 P. 198.

But in *Noonan v. Caledonia M. Co.*, 121 U. S. 393, 30 L. Ed. 1061. 7 Sup. Ct. 911, the Supreme Court of the United States have ruled that on the cession of the reservation the claim

becomes valid. This case was followed by the affirmance of the *Kendall v. San Juan Co. case* above cited (144 U. S. 658, 36 L. Ed. 583, 12 Sup. Ct. Rep. 779, 17 M. R. 475), where the Court adjudged that the original location, although not valid, might have been made good by record in the nature of a relocation within the same period of time after the opening of the reserve, as is allowed to record from the date of discovery. This not having been done, an intervening locator who entered after the opening of the reservation was held to have the elder and better title.

A claim within the reservation can not be patented.—Copp, M. L. 253. And the location of scrip thereon is void.—*U. S. v. Carpenter,* 111 U. S. 347, 28 L. Ed. 451, 4 Sup. Ct. Rep. 435.

The Court will protect a right to mine by license from the Indian nation.—*Oolagah Co. v. McCaleb,* 68 F. 86, 15 C. C. A. 270.

When a reservation is opened it is not necessary for mineral prospectors to await the issue of the proclamation.—*McFadden v. Mt. View Co.,* 87 F. 154.

A location on an opened reservation is not avoided by the fact that the locator had been on the ground before it became open to entry.—*Le Clair v. Hawley,* 18 Wyo. 23, 102 P. 853.

FOREST RESERVES. NATIONAL FORESTS.

By a series of acts beginning with the Act of March 3, 1891, the President was authorized to set apart by proclamation forest reserves on any part of the public lands.

The original Act was a single section reading as follows:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.—Sec. 24, 26 Stat. L. 1103; Compiled Laws 1901, page 1537.

By Act of June 4, 1897, the Secretary of the Interior was authorized to "make such rules and regulations * * * as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction," violation of such rules being punishable by fine and imprisonment.—30 Stat. L. 35. By Act of February 1, 1905, the powers of the Secretary of the Interior were transferred to the Department of Agriculture.—33 Stat. L. 628. These acts seem to continue the right to dispose of the title or of easements with the Secretary of the Interior, but to give control of the Forest Reserves in all other respects to the Secretary of Agriculture.

Under this authority the Secretary of Agriculture has issued what is known as the Use Book. Against the most plausible contention that it was delegated legislation and against the further contention that the location of a mining claim was a segregation of its area from the public domain, the power to inflict punishment for violation of these rules has been sustained. The point arose upon the prosecution of the claimant for keeping a saloon on his claim.—*U. S. v. Rizzinelli*, 182 F. 675. The like ruling was made in a civil suit against a cattle owner in *Light v. U. S.*, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485. See also *Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860.

We can not assume that such regulations will be maintained beyond the limitations contained in the A. C., but the Use Book goes beyond these limitations and far beyond anything heretofore known in the control of the public domain. These various acts reserve the right to use timber to the mining claimant, but the regulations go as far as possible to make the permission of little practical value.

Under the original Act and its amendments vast tracts have been reserved in all parts of the West, some of the reservations being almost totally clear of timber and on most of them the timber found being of little or no commercial value. The Use Book for 1915 states that there are 154 forests with an area of 162,000,000 acres, which equals 263,125 square miles.

By Act of March 4, 1907, the authority to create new reservations or enlarge the old ones in Oregon, Washington, Idaho, Colorado and Wyoming was withdrawn.—Comp. Laws of 1911, page 648. California was added to this list by 37 Stat. L. 497.

In 1905 the name of "Forest Reserves" was changed to "National Forests."

The acts allow the discovery and location of mining claims, both lode and placer, on the reserves, and a mining claim in a forest reserve is made exactly as if it were on non-reserved land, but the Forest Ranger is authorized to examine and report as to its being a *bona fide* claim.

In *U. S. v. Lavenson,* six patents on a forest reserve were cancelled because issued without consideration of the protest of the Forest Ranger, and because there was no mineral value on the property.—206 F. 755. The protest of the Forest Ranger had been apparently overlooked by the Land Office by its own negligence.

The power of the Secretary to make rules on use of Forest Reserves and the power of the government to punish violation of the same as crimes against the United States were upheld by the Federal Supreme Court in *U. S. v. Grimaud,* 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480; on reargument after the Court had been evenly divided on the question in the same case.—216 U. S. 614, 54 L. Ed. 639, 30 Sup. Ct. Rep. 576.

Loney v. Scott holds that claims may be located on a Forest Reserve, but that lands withdrawn for "irrigation works" are a permanent withdrawal and not open to mining location.—57 Or. 378, 32 L. R. A. (N. S.) 466, 112 P. 172.

All mining rights of way are allowed across the forests.—33 Stat. L. 628.

The Department holds that it may, of its own motion, examine into the legality of a location on the reserve.—38 L. D. 59.

The United States has the right to dispose of infected timber on mining claims.—*Lewis v. Garlock,* 168 F. 153.

The regulations of the department permit owners of mining claims to cut timber for actual mining purposes in connection with the particular claim for which the timber is cut.—Par. 20, 30 L. D. 28.

Jurisdiction over timber cutting on the reserve is vested in the Department of Agriculture.—43 L. D. 465.

Mill site locations on Forest Reserve held valid.—43 L. D. 257, 44 L. D. 197.

In the location of a claim upon a Forest Reserve the discovery, staking, and record are perfected with no reference to the fact of its being upon such reserve; nor does the supervision of the Forest Ranger affect the title or the possessory *status,* but his suggestions in regard to use of timber must be heeded. If there be no mineral value upon which to locate and the ranger assert such fact, it is not followed by any action on his part to set aside the claim, but when application for patent is made, a protest on this ground may be made on behalf of the parties or department supposed to be looking after the protection of the forests.

THE WITHDRAWAL ACTS.

By Act of June 25, 1910, the President was authorized at any time in his discretion to temporarily withdraw from settlement, location, sale or entry public land in any State, including Alaska, and reserve the same for water power sites, irrigation, classification of lands or other purposes.—36 Stat. L. 847; Comp. Laws 1911, page 593.

Vested rights were, of course, reserved in the Act and as to minerals it was provided that the withdrawn lands should remain open to exploration for minerals other than coal, oil, gas and phosphates, with a proviso that any *bona fide* occupant or claimant of oil bearing lands who, at the date of withdrawal, was in diligent prosecution of work leading to discovery of oil or gas should not be affected or impaired by such

order so long as such occupant or claimant should continue in diligent prosecution of said work.

By Act of August 24, 1912, the Act was amended with a repetition of the same saving clause as to rights of oil seekers.—37 Stat. L. 497. But the right to prospect and locate was now restricted to metalliferous minerals—which practically means that lode claims may be recorded upon such lands, but not placers.

Under the power so conferred, immense tracts were withdrawn and, although the rights of oil seekers already on the ground were apparently protected, the policy of the government as to such oil seekers immediately became active, and by numerous suits they have been treated as trespassers upon the public domain and forced to bring themselves as defendants into full proof of such facts as would save their initiated rights by bringing themselves within the excepting clauses of the acts.

The validity of the Withdrawal Acts was at once contested and such contest was upheld in the lower court.—*U. S. v. Midway N. Oil Co.*, 216 F. 802.

But the National Supreme Court in a majority opinion reversed the lower Court and held the right of withdrawal to be valid on the ground that such had been the long established practice in dealing with the public domain.—*U. S. v. Midwest Oil Co.*, 236 U. S. 459, 59 L. Ed. 673, 35 Sup. Ct. Rep. 309.

Extent of U. S. Recovery.

In the suit brought in California against the Midway and other oil companies to oust them from the oil lands they had developed, the lower Court at first held the withdrawals to be void and dismissed the suits.—216 F. 802, *supra.* But after the Midwest decision the cases were reinstated and a drastic decision handed down against them.—232 F. 619.

The Court held that location of placer oil claims prior to the withdrawal without actual discovery of the oil gave the locators no rights under the saving clauses of the Act, and

that surface expenditures and outlays to bring water on the land which was absolutely necessary before even drilling could be begun was not sufficient diligence. That the companies were neither actual occupants nor in the diligent prosecution of work. (To same effect is *The Pacific Midway* case, 44 L. D. 420.)

The land prior to the discovery was an arid desert of the nominal value of $3 per acre, but by the success of the wells became worth $2,000 per acre, and this immense accretion of value was due directly to the expenditures of the defendants in excess of $1,000,000.

Although phosphate and other placer minerals are included in the withdrawals as mentioned later, the burden of the pressure of the acts is upon coal and gas.

These pre-eminent equities in favor of the defendants were held by the Court mere circumstances of mitigation which would not prevent the government from securing the property itself and all its products, the increase in value and the profits of the risk—but that they should allow to the oil companies the cost of "extracting and marketing the oil."

The cost of drilling was not allowed on the accounting, but was to be allowed in case the government proved damages incidental to the trespass to the extent of the trespass damages, but no more. As there were no trespass damages this offset amounted to nothing.

The rule that the occupant in good faith should be allowed for his improvements before restoration to the owner was held not to apply.

The oil companies were allowed to remove their tools which, even if they had been willful trespassers, would have remained their property, and their movable fixtures were not confiscated.

The later case of *U. S. v. McCutchen* ruled like points with equal strictness.—234 F. 702.

The department in the case of the Honolulu Oil Co., where the applicants had expended large sums in prospecting and

had started drilling at the date of withdrawal, September 27, 1909, held that the facts brought the company within the saving clauses and validated their entire group of twelve entries. This *Honolulu case* should be expected in 45 L. D.

Subsequent discovery of oil, where work was not being prosecuted at date of withdrawal, does not protect the claim.—40 L. D. 303.

Amended location, taking up more ground, can not be made after withdrawal.—43 L. D. 232.

It is obvious that the very general terms of the Withdrawal Acts implied that future legislation was necessary to control the ultimate disposition of such lands, but no provision for ultimate sale or lease has been made except as hereinafter noted.—44 L. D. 568.

Severance of Surface and Mineral Titles—Asphalt Acts.

The original Act of 1910 was followed by certain acts introducing a new policy for the granting of surface rights with reservation of minerals to the government.

By General Act of July 17, 1914, 38 Stat. L. 509, "lands withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals or which are valuable for those deposits," were declared open to entry under any of the non-mineral Land Office procedures, the patent to reserve such minerals to the United States with conditions for future prospecting of such minerals, and clauses for bonds and damages with prevision of the complications certain to follow such partnership between the United States and the prospector.

Temporary Acts.

By Act of March 2, 1911, 36 Stat. L. 1015, amended by Act of August 25, 1914, 38 Stat. L. 305, it was declared that patents on oil and gas lands should not be denied because of any transfer by the locator before discovery if the lands had not been withdrawn, and provided for contracts between the Secretary of the Interior and the owner of a certain class of oil

and gas claims for division of the proceeds of the wells, which acts seem to have been of only temporary operation.

Utah and Idaho.

Two special acts, one confined to Idaho and one to Utah, provided for sale of such lands with reservation of certain minerals to the Government.—Idaho, February 27, 1913, 37 Stat. L. 687; Utah, August 29, 1912, 37 Stat. L. 496.

Recapitulation.

The synopsis of the effect of the Withdrawal Acts upon the rights of prospectors upon the public domain seems to be:

1. That locations of lode claims may be made upon such lands the same as if they had not been withdrawn.

2. That placer locations upon any class of deposit are forbidden.

3. That the right to the claimant of any kind of mining location was not affected where a possessory right was complete at the date of withdrawal.

4. That coal, oil and gas may not be located upon or claimed in any manner after date of withdrawal.

5. That the rights of oil and gas claimants at the date of withdrawal where they had not been perfected by discovery, are dependent upon their being actual occupants who had begun search and continued it with diligence.

6. That oil and gas lands may be patented as to the surface by homestead or other agricultural claimants, reserving to the government such minerals.

Phosphate and Asphalt.

By Act of January 11, 1915, location of phosphate lands before the withdrawal were validated.—38 Stat. L. 792. In the A. C. of 1914, above cited, phosphate, nitrate, potash and asphaltic lands were made open to agricultural entry with reservation of such minerals to the United States. For practice under this doctrine of severance see 44 L. D. 32, 45 L. D. 77.

ORE CONTRACTS.

An ore purchase contract between mine and smelter for the sale of ore is not assignable, as the mine contracts for the skill and integrity of that particular smelter.—*Arkansas Val. Sm. Co. v. Belden Co.*, 127 U. S. 379, 32 L. Ed. 246, 8 Sup. Ct. Rep. 1308; *Winchester v. Davis Co.*, 67 F. 45, 14 C. C. A. 300; *Wheeler v. Walton Co.*, 64 F. 664.

Failure to receive pay justifies failure to make future deliveries.—*Cherry Val. Co. v. Florence Co.*, 64 F. 569, 12 C. C. A. 306.

Delivery of ore to a reduction company, to be paid for after assay, is a sale and not a bailment of each lot of ore.—*Chisholm v. Eagle Ore Co.*, 144 F. 670, 75 C. C. A. 472.

Action for conspiracy between officers of the mine and mill owners to obtain bonus for treating the ore—presumptions and evidence in such case.—*Fox v. Hale Co.*, 108 Cal. 369, 41 P. 308.

A, in Michigan, agreed to sell to plaintiff graphite ore to be delivered on cars in Mexico. *Held*, that cause of action for non-delivery accrued in Mexico.—*U. S. Graphite Co. v. Pacific Co.*, 68 F. 442.

Construction of ore contracts calling for certain percentages of mineral and for special assay values with deductions for moisture.—*Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83, 42 N. J. Eq. 251, 7 Atl. 353; *Lehigh Co. v. Trotter*, 43 N. J. Eq. 185, 7 Atl. 650, 10 Atl. 607, 608; *Anvil Co. v. Humble*, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. Rep. 876, 18 M. R. 98; *Martinez v. Earnshaw*, 143 Pa. 479, 22 Atl. 668. Measure of damages for failure to deliver ore.—*Patrick v. Colorado Sm. Co.*, 20 Colo. 268, 38 P. 236.

Amount of moisture is determinable by tests of like ore from same mine.—*Vietti v. Nesbitt*, 22 Nev. 390, 41 P. 151, 18 M. R. 247.

The smelter is not liable for mineral left in the tailings, there being no proof of negligence.—*Guild Co. v. Mason,* 115 Cal. 95, 46 P. 901.

Where an average of a certain assay is to be accounted for, one month may make up for another.—*Fox v. Mackay,* 125 Cal. 54, 57 P. 672, 20 M. R. 89.

Construction of contract for delivery of ore "free from foreign substance."—*Worthington v. Gwin,* 119 Ala. 44, 43 L. R. A. 382, 24 So. 739. Of ore breaking contract terminable when prejudicial to the development of the mine.—*Anvil Co. v. Humble,* 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. Rep. 876, 18 M. R. 98.

When the buyer refuses to receive, the seller has the right to store the ore and sue for the price; or to sell the ore and recover the difference in price.—*Habeler v. Rogers,* 131 F. 43, 65 C. C. A. 281.

Contract construed to bind the seller to furnish the ore of its own mines.—*Shackelford v. Sloss Co.,* 36 So. 1005, 140 Ala. 329.

A contract for the ore of a certain mine entitles the buyer to the run of the mine, although the ore tendered from another mine was not below the agreed assay.—*Globe Co. v. Tennessee Co.,* 27 Ky. Law Rep. 636, 85 S. W. 1177. A contract to furnish coal from a particular mine is not fulfilled by tender of coal from other mines though equally good.—*Hesser v. Chicago Co.,* 151 F. 211, 80 C. C. A. 263.

Debts Payable Out of the Mine.

A promise to pay a debt out of the proceeds of ore is not an equitable assignment of such proceeds.—*Silent Friend Co. v. Abbot,* 7 Colo. App. 73, 42 P. 318.

A contract or promise to pay out of the proceeds of a mine becomes an absolute promise after the lapse of a reasonable time.—*McIntyre v. Ajax Co.,* 28 Utah 162, 77 P. 613; *White v. Century Co.,* 28 Utah 331, 78 P. 868; *Busby v. Century Co.,* 27 Utah 231, 75 P. 725.

An agreement to pay out of the first net proceeds of the mine means the first excess of ore receipts above current expenses, and those outlays which constitute the capital are not to be deducted.—*Crocker v. Barteau,* 212 Mo. 359, 110 S. W. 1062.

Where the assignee of a mining lease agrees to pay a consideration therefor out of the net proceeds of the mine, such assignee is not bound to continue work at a loss after reasonable expenditures show that net proceeds can never be reasonably expected.—*Caley v. Portland,* 18 Colo. App. 390, 71 P. 892, 22 M. R. 595.

Where defendant agreed to pay plaintiff a certain proportion of the price of a mine, plaintiff is entitled to his proportion of stock received where the mine is paid for in stock.—*Kinard v. Jordan,* 10 Cal. App. 219, 101 P. 696.

A covenant to pay out of proceeds held to run with the mine.—*Hinchman v. Cons. Arizona Co.,* 198 F. 907.

Where purchase price is to be paid from the gross output of the claims defendant can not escape performance by willfully neglecting to work. And if the mine was in fact barren the burden is on him to prove it.—*Pritchard v. McLeod,* 205 F. 24, 123 C. C. A. 332.

A party bought a fourth interest in mining claims, paying part of the consideration, the balance "to be part of the first money taken out of the ground." *Held,* that this meant the gross, not net, proceeds of the buyer's fourth interest.—*Lesamis v. Greenberg,* 225 F. 449; *Blanck v. Pioneer Co.,* (Wash.) 159 P. 1077.

A promise by the owners to pay for service in operating a mine out of proceeds of sale is a joint and several contract.—*Bell v. Adams,* 90 P. 118, 150 Cal. 772.

ORE BUYERS.

Ore Book to Be Kept.

By Act of 1915, supplanting a prior similar act, every ore buyer is required to take out a State License and to keep a book, registering:

First—The name of the party on whose behalf such ores, concentrates, gold dust, gold or silver bullion, nuggets or specimens are delivered.

Second—The weight or amount, and a short description of each lot thereof.

Third—The name and location of the mine or claim from which it shall be stated that the same has been mined or procured.

Fourth—The name of the party delivering the same, the date of delivery, and whether the party making the delivery is an owner, lessee, superintendent, foreman or workman in such mine.

These provisions supersede R. S. § 4235 and are to be construed in connection with the sub-chapter on mines entitled, Ore Buyers, Secs. 4235-4256. *Acts of 1915, p. 347.*

The succeeding sections provide that parties claiming an interest in ore delivered shall have the privilege of examining such books and for penalties in case of failure to keep the same. And that neglect to make proper inquiries from parties bringing ore to the mill shall not excuse failure to comply. They also attempt to make the purchaser criminally liable for ore bought from mines held "contrary to any penal law now in force," which was intended to include cases where possession had been taken by violence, contrary to the provisions of the Jumping Act.—R. S. Secs. 4220, 4239.

Bullion and Specimen Buyers.

A similar act refers to buyers of gold dust, amalgam, bullion and gold specimens, the intent being to produce means to trace such property when stolen.—R. S. Secs. 4252-4255.

Ore Bought of Wrongful Mine Claimant.

In 1889 the question of the responsibility of the ore buyer for ore taken by trespass having often arisen and a case of

some importance involving the question then pending in the Supreme Court, an act was passed providing for the ease of ore taken from mines, the title to which was in dispute.

It provides that a party in peaceable possession under claim and color of title is to be deemed the owner, and the buyer of ore, in good faith, is to take title to the ore, but that the party out of possession may protect himself by notice to the ore buyer, the following form containing the substance required:

Denver, Colo., *January* 9, 1916.

To *The Taylor & Brunton Sampling Works Company:*

Take notice that I am the claimant and owner and entitled to the possession of the *Nightmare* Lode Mining Claim, situate in Creede Mining District, County of Mineral, State of Colorado; That *Richard A. Parker* and *Thomas B. Crawford* and persons under them are mining and shipping gold ore which is my property, from said claim under the name of the *Pleasant Dream* Lode, or under some other name. And you are hereby notified under the terms of the Statute in such case made and provided that you will be held responsible for all ores purchased and delivered from said mine by said *Richard A. Parker* and *Thomas B. Crawford*, or either of them, or by any person for them, subsequent to the service of this notice.

ERNEST LE NEVE FOSTER.

The person serving this notice must within five days thereafter follow it up with suit for injunction, and provision is made to limit the liability in case the injunction is not heard within thirty days, and to avoid its effect if the writ is denied or afterwards discharged, although the plaintiff may ultimately prove title. If such notice is served and followed by obtaining the writ and the party warned persists in buying the ores in dispute, he is to be held responsible to the person ultimately adjudged the owner.

If suit has been already brought when the notice is served, add to the above form: (Sec. 4238.)

Suit is pending in the District Court of *Mineral* County to enjoin the further shipping or sale of ores by said parties from said claim.

A proviso is contained in the Act that it shall not protect against liability for the purchase of ores taken by persons holding claims under the Mine Jumping Act, or ore stolen by lessees.

Ore Mined Under Claim of Right.

The suit above referred to, *Omaha Co. v. Tabor,* 16 M. R. 184, 13 Colo. 41, 16 Am. St. Rep. 185, 5 L. R. A. 236, 21 P. 925, was decided later, holding the ore buyers liable as trespassers—the decision making no reference to the point really involved or the line of authorities relative to the point—that, where personal property is produced from real, by the labor of a party in possession with claim and color of title, it becomes marketable without regard to the ultimate decision on the question of who was the owner of the realty.—*Brown v. Caldwell,* 12 M. R. 674, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660; *Smith v. Idaho Q. M. Co.,* 2 Cal. Unrep. 681, 11 P. 878; *Mather v. Trinity Church,* 14 M. R. 472, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; *Lehigh Co. v. New Jersey Co.,* 55 N. J. L. 350, 26 Atl. 920, 17 M. R. 600; *Harlan v. Harlan,* 15 Pa. St. 507, 53 Am. Dec. 612; *Anderson v. Hapler,* 34 Ill. 436, 85 Am. Dec. 318; *Page v. Fowler,* 28 Cal. 605; *National T. Co. v. Weston,* 121 Pa. 485, 15 Atl. 569, 17 M. R. 143; *Giffin v. South West Pipe Lines,* 172 Pa. 580, 33 Atl. 578. See *Pearce v. Aldrich M. Co.,* 184 Ala. 610, 64 So. 321.

Smelters' Rules.

The rule of a smelting company that ore left for fifteen days without directions where to apply the proceeds should belong to the smelter without payment is arbitrary and unreasonable.—*Cons. Kansas City Co. v. Gonzales,* 50 Tex. Civ. 79, 109 S. W. 946.

PENAL PROVISIONS.

False Weights and Assays.

There are in all the mining States penal statutes more or less alike in wording and intent prescribing punishment for such self-evident offenses as the using of fraudulent gold dust scales (Sec. 1851), or false ore buyers' weights and scales, or

the certifying to false assays or making false return of ore weight or value.—R. S. Colo. Sec. 4240.

Debased Gold Dust.

Sections 1708, 1709, make it penal to knowingly have or pass debased gold dust. In *People v. Page*, 1 Ida. 102, the defendant was convicted on indictment for having in possession instruments for manufacturing bogus gold dust. In *People v. Sloper*, 1 Ida. 158, and *People v. Page*, 1 Ida. 189, the offense of uttering such material is discussed.

Salting Ore.

That every person who shall mingle or cause to be mingled with any sample of gold or silver-bearing ore, any valuable metal or substance whatever that will increase or in any way change the value of said ore, with the intent to deceive, cheat or defraud any person or persons, shall, on conviction thereof, be punished by a fine of not less than five hundred nor more than one thousand dollars, or by confinement in the penitentiary for a term not less than one nor more than fourteen years, or by both such fine and imprisonment.—*R. S. Colo. Sec.* 1863.

Ore Stealing from the Mine.

If any person shall break, sever or separate with intent to steal, ore or mineral from any mine, lode, ledge or deposit in this State, or shall take, remove or conceal ore or mineral from any mine, lode, ledge, deposit or dump with intent to defraud the owner or owners, lessee or licensee, or any tenant in possession of any mine, lode, ledge, deposit or dump, or any person in possession and claiming under color of title any mine, lode, ledge, or dump, such person shall be deemed guilty of grand larceny, and upon conviction shall be punished as for grand larceny.—*R. S. Colo. Sec.* 1680.

The above section amends the Act of 1903, which was limited to ore of the value of $20.

By Colorado Act of 1909, p. 451, stealing ore or concentrates from any smelter or reduction works is made grand larceny.

Robbing a sluice box is an extraditable crime.—*Tiberg v. Warren*, 192 F. 458, 112 C. C. A. 596.

Trespass Not Larceny.

Except as modified by such statutes as said section 1680, the taking of ore by severing it from the realty accompanied by its immediate asportation, can in no case be considered larceny. —*People v. Williams,* 35 Cal. 671, 4 M. R. 185; *State v. Berryman,* 8 Nev. 262, 4 M. R. 199; *State v. Burt,* 4 M. R. 190, 64 N. C. 619.

This distinction is in some of the cases referred to as unsubstantial and technical, although its force, as decided law, is not questioned. On the contrary, it is a distinction necessary to check the constant tendency to seek a criminal remedy where the civil remedy is ample. Excepting the instance of what is known as "high-grading" the severance is wholly without felonious intent.

Injunction Against Buying High-grade.

Such a writ was allowed against a purported assayer who in fact was a receiver for high-grade ore stolen from the mines at Goldfield, Nev.—*Goldfield Co. v. Richardson,* 194 F. 198. But equity jurisdiction in a like case was denied in *Daniels v. Portland M. Co.,* 202 F. 637, 121 C. C. A. 47, 45 L. R. A. (N. S.) 827.

Moving Stakes.

The malicious removal of location marks is made a misdemeanor by the terms of R. S. Colo. Sec. 1899.

Under a statute on this subject it was held that there must be proof of a lawful stake on a valid mining claim—and that where the only proof of discovery was that the stake was posted after finding "quartz and vein matter," there was no proof of a valid location stake, such as the law was intended to protect.—*Territory v. Mackey (McKey),* 8 Mont. 168, 19 P. 395.

Malicious Mischief.

By R. S. Colo. 1900, it is made a misdemeanor to unlawfully destroy any shaft-guard or remove the timbers from any shaft, incline or tunnel.

Cutting Timber or Removing Buildings.

Besides the section as to malicious mischief there are two sections harsh and cruel, in defining mere trespass into crime, by leaving out entirely the element of malice or other criminal intent, making the cutting of timber or removing of buildings a misdemeanor.—Secs. 4222, 4223. The strictest construction against it has been heretofore given to a statute of similar wording.—*Bradley v. People,* 8 Colo. 599, 9 P. 783.

Jumping Claims by Stealth or Violence.

R. S. Colo. 4220, passed in 1874, prohibits acts of this character. The Act consists of a single paragraph of interminable length. It makes the association of two or more persons for the purpose of taking possession of a claim in possession of another, by stealth or violence, a misdemeanor. The section is intended to prevent what has commonly been termed "jumping," which word is met with in some of the old statutes as well as in the district rules, and occasionally in law reports.—*Arnold v. Baker,* 7 M. R. 111, 6 Neb. 134; *Murphy v. Cobb,* 5 M. R. 330, 5 Colo. 281. As a penal statute it is awkwardly framed, and the substantial remedy is by a section passed at the same time, by which *possession is restored* to the party forcibly dispossessed.—See p. 471.

Coal Mines Are Regulated by Detailed Local Statutes in almost every State involving inspection and attempting to guard against explosions and other dangers.—R. S. Colo. Secs. 638-660. Such regulations are generally upheld as constitutional.—*Rail & River Coal Co. v. Yaple,* 236 U. S. 338, 59 L. Ed. 607, 35 Sup. Ct. Rep. 359.

Oil Wells Are Required to Keep Their Products from emptying into any natural water course.—R. S. Colo. 1818.

Ventilation—Children.

The Colorado Constitution, Art. 16, Sec. 2, requires the passage of laws securing safety escapes and ventilation in mines.

The acts on these subjects are cited under BUREAU OF MINES, p. 481.

The employment of children under fourteen years of age is forbidden by R. S. Sec. 547.

The eight-hour law applies to underground miners, to smelters and other ore-treating processes.

EJECTMENT.

Pleadings.

Under Code practice the names of the various actions are abolished, but the distinctions being inherent, the term ejectment has its specific application the same as formerly.

Section 286 Colo. Code requires a concise statement in the complaint of the nature of the title when possessory.

The case of *National M. Co. v. Piccolo* clearly states the essentials and non-essentials of a complaint in ejectment.—54 Wash. 617, 104 P. 128.

Discovery need not be alleged in a pleading. It is a matter of evidence.—*Protective Co. v. Forest City Co.*, 51 Wash. 643, 99 P. 1033.

Ground, Mineral or Non-Mineral.

In *Duffield v. San Francisco Chemical Co.*, 198 F. 942, the Court refused to allow any evidence as to whether the ground

was properly locatable as a placer or as a lode claim, holding that issue to be exclusively triable in the Land Office. See p. 252. But in a later suit between the same parties concerning other ground, the Circuit Court of Appeals, without citing the former case, held that determination of this point was necessarily involved and must be determined as it was by the Court.—*San Francisco Chemical Co. v. Duffield,* 201 F. 830, 120 C. C. A. 160.

Supporting Adverse Claims.

It is the proper action to bring, and the one in fact generally brought in support of an adverse claim.—*Becker v. Pugh,* 15 M. R. 304, 9 Colo. 589, 13 P. 906; *Burke v. McDonald,* 2 Ida. 310, 13 P. 351. In such suit it is immaterial which party is in actual possession at the time when the action was brought.—*Id.* And no proof of an ouster is required.—*Golden Fleece Co. v. Cable Co.,* 1 M. R. 120, 12 Nev. 312. Or each party may be in possession of a part of the contested premises.—*Rose v. Richmond Co.,* 17 Nev. 25, 27 P. 1105. Notifying defendant not to work is an ouster.—*Bramlett v. Flick,* 23 Mont. 95, 57 P. 869, 20 M. R. 103.

The object of the suit is to determine the right of possession, and the result is to decide which party is entitled to a patent from the United States. The government being thus an interested party, each side must prove its own case affirmatively, and to either recover or successfully defend must show a valid location.—*Bay State Co. v. Brown,* 21 F. 167; *Jackson v. Roby,* 109 U. S. 440, 27 L. Ed. 990, 3 Sup. Ct. Rep. 301; *McGinnis v. Egbert,* 8 Colo. 41, 5 P. 652, 15 M. R. 329; *Rosenthal v. Ives,* 15 M. R. 324, 2 Ida. 265, 12 P. 904. Neither party is entitled to a verdict upon mere proof of prior possession alone—as is the rule in a contest where individuals only are interested.—*Sears v. Taylor,* 5 M. R. 318, 4 Colo. 38. But possession alone is good against an intruder, especially one who enters by violence.—*Haws v. Victoria Co.,* 160 U. S. 303, 40 L. Ed. 436, 16 Sup. Ct. Rep. 282. Possession may become incidentally a material issue in the case.—See ADVERSE CLAIM.

Averment of Suit Brought in Time.

In a complaint carefully and technically drawn there will be an averment that the adverse claim was filed within the period of publication and the suit brought within the 30 days, but both the right of the thing and the weight of authority are that they are not essential averments. If, in fact, the adverse claim was not filed or the suit not brought within these respective limited periods it is a matter of defense to be raised by the answer.—*Providence Co. v. Marks,* 7 Ariz. 74, 60 P. 938; *Marshall Co. v. Kirtley,* 12 Colo. 410, 417, 21 P. 492, 16 M. R. 6; *Altoona Co. v. Integral Co.,* 45 P. 1047, 114 Cal. 100; *Pennsylvania Co. v. Bales,* 18 Colo. App. 108, 70 P. 444, 22 M. R. 436; *Hain v. Mattes,* 34 Colo. 345, 83 P. 127.

No Second Suit.

If suit be dismissed a second suit can not be brought after the expiration of the thirty days.—*Steves v. Carson,* 16 M. R. 12, 42 F. 821; and if not filed in time the suit can not be supported as an ordinary ejectment.—*Hunt v. Eureka Gulch Co.,* 14 Colo. 451, 24 P. 550, 17 M. R. 340.

Second Trial.

At common law a verdict in ejectment was not *res adjudicata* of the title, and repeated suits were liable to be brought. As a compromise on this point some States allowed a second trial as of right on payment of costs of the first suit, the judgment in such second suit to be final if in favor of the same party. In other words, there must be two verdicts for the same party to make the adjudication decisive. Such statutory new trial in Colorado has been abolished since 1899 and is not generally now provided for elsewhere. A second trial for errors of law may of course be granted.

Possession Without Location—Location Without Discovery.

The Congressional Act, Sec. 2320, says that "no location of a mining claim shall be made until the discovery of the vein." And in sequence to this it has been ruled that if there is no

valid location there can be no rightful possession.—*Belk v. Meagher*, 1 M. R. 510, 104 U. S. 279, 26 L. Ed. 735; *Sweet v. Webber*, 7 Colo. 443, 450, 4 P. 752; *Cook v. Klonos*, 164 F. 529, 90 C. C. A. 403. A prospector, at least after he has discovered mineral, has the right to be undisturbed in whatever shaft or other work he is prosecuting.—*Faxon v. Barnard*, 4 F. 702, 2 McCrary 44, 9 M. R. 515. But only by compliance with the statute (by a valid location) can he prevent other prospectors from entering upon any ground except that in his actual occupation.—*Becker v. Pugh*, 15 M. R. 304, 9 Colo. 589, 13 P. 906. The posting of notice without discovery or indications of mineral can not warn off other prospectors.—*Erhardt v. Boaro*, 113 U. S. 537, 28 L. Ed. 1116, 5 Sup. Ct. 565, 15 M. R. 447. He may protect himself in his *pedis possessio* (the ground in actual as distinguished from constructive possession), while in the search for, before he has discovered, mineral. And as against another miner, where neither has discovered a vein, he has the better right.—*Field v. Grey*, 1 Ariz. 404, 25 P. 793.

The question which these citations lead up to is this: Can a prospector, before discovering mineral, stake off a full claim and keep off all other prospectors while he is engaged in hunting for mineral? In other words, can he set up his stakes first and make his discovery afterward on the supposition that when he does strike the vein his stakes already set will be found to cover the legal width on each side? Can he, in spite of the law which says he can not, make a valid location before discovery; or, which is the same thing, have all the practical benefits of a location, before such discovery? The cases go to the length of protecting his actual workings—and this would prevent encroachment so close as to hinder work or threaten a breach of the peace. The *Boaro case* seems to intimate that he may protect himself when at work on float, or after substantial assurance of the proximity of the lode. In the *Field case* the point is approached and almost decided, that he may hold by location without discovery. The burden of the other cases and the text of the law are against the proposition—that staking a claim before discovery excludes other prospectors. All have

the same right to seek till one has found; no one has a right to fence out others from the right of seeking what he himself is only seeking. See pp. 27, 34.

The party who is the first to comply with the law though he may not be the first discoverer holds the first title.—*Sisson v. Sommers,* 19 M. R. 644, 24 Nev. 379, 77 Am. St. Rep. 815, 55 P. 829; *Lockhart v. Johnson,* 181 U. S. 516, 527, 45 L. Ed. 979, 985, 21 Sup. Ct. 665; *Copper Globe Co. v. Allman,* 21 M. R. 296, 23 Utah 410, 64 P. 1019; *Gregory v. Pershbaker,* 15 M. R. 602, 73 Cal. 109, 14 P. 401; *Ferris v. McNally,* 45 Mont. 20, 121 P. 889, 890.

Prior possession is better title than an invalid location.—*Connolly v. Hughes,* 18 Colo. App. 372, 71 P. 681.

The right of possession is a transferable interest.—*Rooney v. Barnette,* 200 F. 700, 119 C. C. A. 116. When neither party has a valid location possession is good title in the claimant.—*Protective Co. v. Forest City Co.,* 51 Wash. 643, 99 P. 1033.

Possession—How Proved.

A person who has purchased a mining claim which has been properly located and marked out upon the ground, and who is personally or by his agents upon the claim, working and developing it, and keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim by virtue of mining laws, but is in the actual possession of the whole claim. Such possession is a *possessio pedis,* extending to the boundary lines of the claim.—*North Noonday Co. v. Orient Co.,* 1 F. 522, 6 Sawy. 299, 9 M. R. 529, 531. Digging a shaft, building a cabin, etc., held proof of possession.—*Koons v. Bryson,* 69 F. 297, 16 C. C. A. 227.

Actual occupation of a part of the claim under papers calling for the entire tract by metes and bounds, or by the name of the claim, gives constructive possession of the entire tract.—*Harris v. Equator Co.,* 12 M. R. 178, 8 F. 863, 3 McCrary 14; *Attwood v. Fricot,* 17 Cal. 37, 38, 76 Am. Dec. 567, 2 M. R. 305; *Hess v. Winder,* 12 M. R. 217, 30 Cal. 349.

Possession is a question of law.—*Jordan v. Duke,* 4 Ariz. 278, 36 P. 896. A witness must testify to facts, and it is for the Court to say whether these facts amount to possession.—*Thistle v. Frostburg Co.,* 10 Md. 129. But the uniform holding of the United States Court, at Denver, has been that the question as to possession may be asked directly, leaving it to the cross-examination to bring out whether the facts stated amount to possession, and this is the more sensible practice.

The possession of the surface enclosing the apex is the possession of the vein wherever the dip may carry it.—*Montana Co. v. St. Louis Co.,* 102 F. 430, 431, 42 C. C. A. 415, 20 M. R. 507. A prospector drilling for oil is in possession and ejectment is the remedy to test his right of possession.—*Cosmos Co. v. Gray Eagle Co.,* 112 F. 4, 50 C. C. A. 79, 61 L. R. A. 230; Aff'd 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. 692, 24 Sup. Ct. 860.

The owner of a patented claim is presumed to be in possession of all the surface within the patent lines.—*Original C. Co. v. Abbott,* 167 F. 681.

After location is completed the locator is not bound to remain in actual possession of the property.—*Holdt v. Hazard,* 10 Cal. App. 440, 102 P. 540.

Where a statute speaks of parties in possession, it means that constructive possession which the law attaches to the title. —*Heinze v. Butte Co.,* 126 F. 1, 61 C. C. A. 63. A mine claimant is in possession to his boundaries, although he may not know where his boundaries are.—*Molina v. Luce,* 9 Ariz. 29, 76 P. 602. A party may be in legal possession, though not personally on the land at the time of a stranger's entry.—*Davis v. Dennis,* 43 Wash. 54, 85 P. 1079.

Living in a tent on the claim and working on the same constitute actual possession of mining ground.—*Lange v. Robinson,* 148 F. 799, 79 C. C. A. 1.

What Is Not Possession.

Surreptitious running of a drift under the lines of the claim of another does not constitute possession of such claim.—*Badger Co. v. Stockton Co.*, 139 F. 838.

Sinking an old shaft a few feet deeper and no other work done during a period of seven years does not amount to possession.—*Costello v. Muheim*, 9 Ariz. 422, 84 P. 906.

Digging of test pits by claimant of the severed mineral estate is not such possession as amounts to notice.—*Kendrick v. Colyar*, 143 Ala. 597, 42 So. 110.

Right to Defend Possession.

A party in possession may defend by force against persons claiming the premises and attempting to oust him, and even the rightful owner can not invade such possession by force.—*Hickey v. U. S.*, 168 F. 536, 93 C. C. A. 616, 22 L. R. A. (N. S.) 728.

An Equitable Defense May Be Set Up in Ejectment.—

South End Co. v. Tinney, 22 Nev. 19, 35 P. 89. Such defense must be specially pleaded.—*Brady v. Husby*, 21 Nev. 453, 33 P. 801.

A mine owner's admission that he had no title may be explained by his misapprehension of the law of the case.—*Crary v. Dye*, 208 U. S. 515, 52 L. Ed. 595, 28 Sup. Ct. 360.

Title in Third Party.

The rule that plaintiff must recover on the strength of his own title does not prevail in an action between possessory claimants.—*Strepey v. Stark*, 7 Colo. 614, 622, 5 P. 111, 17 M. R. 28; *Murray Co. v. Havenor*, 24 Utah 73, 66 P. 762, 21 M. R. 668. Otherwise, as to parties claiming under patent, or in ordinary contests as to legal title.—*Dyke v. Whyte*, 17 Colo. 296, 29 P. 128. A patentee has no right to disturb any person in possession of ground under, but excluded from, his patent.

—*Reynolds v. Iron Silver Co.*, 15 M. R. 591, 116 U. S. 687, 29 L. Ed. 774, 6 Sup. Ct. 601.

The Location Certificate as Evidence—Presumption of Location.

Where a plaintiff has been in actual possession of his claim for the full period of the Statute of Limitations a presumption may be indulged as against a wrongdoer at least, that his location was regularly made, without putting him to proof of its successive steps.—*Harris v. Equator Co., supra;* cited and approved in *Vogel v. Warsing*, 146 F. 949, 77 C. C. A. 199. When the location has been made for a considerable time and is held by *bona fide* purchasers the location certificate is *prima facie* evidence of discovery and location.—*Cheesman v. Hart*, 16 M. R. 263, 42 F. 98; *Yreka Co. v. Knight*, 133 Cal. 544, 65 P. 1091, 21 M. R. 478. In *Cheesman v. Shreeve*, 40 F. 787, 791, 17 M. R. 260, it was held presumptive evidence of discovery. It is evidence of the performance of all things which the statute requires it to recite.—*Bismarck Co. v. N. Sunbeam Co.*, 14 Ida. 516, 95 P. 14; *Strepey v. Stark*, 7 Colo. 614, 619, 5 P. 111, 17 M. R. 28.

Exact evidence of all details is not to be expected in proof of discovery and location made many years before the time of trial.—*Becker v. Pugh*, 17 Colo. 243, 245, 29 P. 173; *Yreka Co. v. Knight*, 21 M. R. 478, 65 P. 1091, 133 Cal. 544.

But in the absence of a statute to such effect and barring the above exceptional instances it does not prove discovery or the several acts of location.—*Niles v. Kennan*, 27 Colo. 502, 62 P. 360, 21 M. R. 33; *Mutchmor v. McCarty*, 149 Cal. 603, 87 P. 85; *Thomas v. South Butte Co.*, 211 F. 105, 106, 128 C. C. A. 33; *Childers v. Lahann*, 19 N. M. 301, 142 P. 924.

By statute in Nevada and Montana the location certificate is *prima facie* evidence of location.

Supplemental Record in California.

By the statute of California, in force since July 1, 1909, it is provided (Sec. 1426 I.), that the holder of a possessory claim

may have his boundaries and corners established by a U. S. Deputy Mineral Surveyor, or a licensed surveyor of the State, and his claim connected with some corner of a United States survey. He may then record a declaratory statement (equivalent to a second location certificate) containing the field notes of such survey with the certificate of the surveyor stating: First, that said survey was actually made by him, giving the date thereof. Second, the name of the claim surveyed and the location thereof. Third, that the description incorporated in the declaratory statement is sufficient to identify.

Such record is made *prima facie* evidence "of the facts therein contained," *i. e.*, it becomes *prima facie* proof of the discovery and all acts of location.

Right to Jury Trial.

Where a party is in peaceable possession of real estate under contention that he is the lawful owner of the same, he has the conceded right to trial by jury before he can be legally ousted therefrom.—*Atkinson v. J. R. Crowe M. Co.*, 80 Kan. 161, 18 Ann. Cas. 242, 39 L. R. A. (N. S.) 31, 102 P. 50, 106 P. 1052.

But where he is, at the same time, removing mineral from the land he may become the defendant in an injunction suit which is, of course, an equity proceeding.

Conceding the jurisdiction of an equity court in such case to proceed without trial by jury to afford the injunctive relief, does the mere fact that equity has jurisdiction to preserve the property give it the right to try the title also and deny to defendant his right of trial by jury? Such question, it seems to us, ought to answer itself—that the plaintiff by mere choice of his form of action can not deprive the defendant of his right of jury trial.—*Golden Cycle Co. v. Christmas Co.*, 204 F. 939, 123 C. C. A. 261.

But there are cases which seem to allow the prayer for injunctive relief to take away the defendant's constitutional right of trial by jury.—*Esselstyn v. U. S. Corp.*, 59 Colo. 294, 149 P. 93.

Jurisdiction in equity to enjoin does not give jurisdiction to quiet title in favor of a plaintiff out of possession.—*United States Min. Co. v. Lawson,* 115 F. 1005. But the right to jury trial may be waived when objection is not made below. *El Dora Oil Co. v. United States,* 229 F. 946.

Maps and Models.

Where evidence can be understood only by reference to maps and the maps are not preserved in the bill of exceptions, the bill does not contain all the evidence, notwithstanding its assertion to that effect.—*Diamond Co. v. Cuthbertson,* (Ind. App.) 67 N. E. 558.

Cost of map may be taxed as costs.—*Kelly v. Butte,* 44 Mont. 115, 119 P. 171. A map made for a party to the suit may be used as evidence against it.—*Liberty Bell Co. v. Smuggler Union Co.,* 203 F. 795, 796, 122 C. C. A. 113. The jury should be allowed to take the model to the jury room.—*Illinois Co. v. Raff,* 7 N. M. 336, 34 P. 544.

Ejectment Lies to Recover Ditch and Water Rights.—*Integral Co. v. Altoona Co.,* 75 F. 379, 21 C. C. A. 409.

Non-Joinder of Co-Tenant.

It is no defense that all of plaintiff's co-owners are not made parties to the suit.—*Weese v. Barker,* 7 Colo. 178, 2 P. 919; *Erhardt v. Boaro,* 15 M. R. 472, 473, 113 U. S. 527, 28 L. Ed. 1113, 5 Sup. Ct. 560. One co-tenant may recover the whole estate in ejectment against strangers.—*King Solomon Co. v. Mary Verna Co.,* 22 Colo. App. 528, 127 P. 129, 130.

Allowance for Improvements.

A defendant holding by *bona fide* claim of title is by statute in instances to be allowed for improvements. But mining is not necessarily an improvement.—*Bacon v. Thornton,* 16 Utah 138, 51 P. 153. Such allowance is expressly forbidden by Colorado Code, Secs. 277, 291.

FORCIBLE ENTRY.

The acts concerning forcible entry and unlawful detainer apply to possessory as well as other claims; but those acts are so involved, and so abrupt and cruel in their attempt to substitute haste for deliberation, that they result in driving to appeals and in the end to more lengthy and costly litigation than where ejectment is resorted to in the first instance.

Like acts in other States—the repeated attempts by summary process to deprive a defendant of his day in court under pretense of doing speedy justice—are open to the same comment. Except as against a tenant holding over in defiance of his lease or refusing the payment of royalty or rent, this action will always be found a dangerous substitute for the ordinary action of ejectment. Especially is this the case where actions are commenced before justices of the peace, before whom proceedings are so vexatious, oppressive, and attended with so much heavier costs than such as accrue in Courts of Record, that it is rarely advisable to seek the remedy for any wrong, in any form of action, before them.

MEASURE OF DAMAGES.

Trespass for Ore Taken.

The true measure of damages depends upon circumstances of aggravation, ranging from the profits of working to the gross value of the ore after breaking from the stope, or even down to its value in place before breaking.—*Empire Co. v. Bonanza Co.*, 67 Cal. 406, 7 P. 810; *In re United Merthyr Co.*, 10 M. R. 153, L. R. 15 Eq. 46; *Ege v. Kille*, 84 Pa. 333, 10 M. R. 212; *Liberty Bell Co. v. Moorhead Co.*, 58 Colo. 308, 145 P. 686.

The cost of mining should be deducted from the value of the ore in all cases where neither fraud nor culpable negligence

constitutes any element of the case.—*Waters v. Stevenson,* 13 Nev. 157, 10 M. R. 240, 29 Am. Rep. 293; *Durant Co. v. Percy Co.,* 93 F. 166; *Hall v. Abraham,* 44 Or. 477, 75 P. 882; *Lewis v. Virginia Co.,* 69 S. C. 364, 104 Am. St. Rep. 806, 48 S. E. 280. When coal was taken under *bona fide* claim of right a reasonable royalty should be the measure of damages.—*Sandy R. Co. v. White House Co.,* 125 Ky. 278, 101 S. W. 319, 102 S. W. 320; *Kingston v. Lehigh Val. Co.,* (Pa.) 88 Atl. 768; *Stark v. Penn. Co.,* (Pa.) 88 Atl. 770.

Under ordinary circumstances the just rule of compensation is the value of the rock, coal, ore or oil before the mining or quarrying began—the value in place.—*Dougherty v. Chesnutt,* 86 Tenn. 1, 5 S. W. 444; *Coal Creek Co. v. Moses,* 15 Lea (Tenn.) 300, 54 Am. Rep. 415, 15 M. R. 544; *Ege v. Kille, supra; Dyke v. Nat. Tr. Co.,* 22 App. Div. 360, 49 N. Y. Supp. 180. And where the ore has been taken by defendant's lessee, the royalty may be taken as the net profit.—*Colo. Cent. Co. v. Turck,* 70 F. 294, 70 C. C. A. 128; *New Dunderberg Co. v. Old,* 97 F. 150, 38 C. C. A. 89; *Moragne v. Doe,* 143 Ala. 459, 11 Am. St. Rep. 52, 5 Ann. Cas. 331, 39 So. 161; *Turner v. Seep,* 167 F. 646; *Pioneer Co. v. Mitchell,* 190 F. 937, 111 C. C. A. 571.

In willful trespass, or where the defendant has mingled the ore or taken any steps to prevent ultimate proof of its value, these acts are to be taken against the defendant.—*Cheesman v. Shreeve,* 40 F. 788, 17 M. R. 260; even so far as to throw the burden of proving the value upon the defendant.—*Little Pittsburg Co. v. Little Chief Co.,* 11 Colo. 223, 7 Am. St. Rep. 226, 17 P. 760, 15 M. R. 655; *St. Clair v. Cash Co.,* 9 Colo. App. 235, 47 P. 466, 18 M. R. 523; and in cases of fraud a co-tenant may even be denied plaintiff's share of legitimate expenses.—*Foster v. Weaver,* 15 M. R. 551, 118 Pa. 42, 4 Am. St. Rep. 573, 12 Atl. 313. A wrongdoer is not entitled to cost of mining.—*Benson Co. v. Alta Co.,* 145 U. S. 428, 12 Sup. Ct. Rep. 877, 36 L. Ed. 762, 17 M. R. 488; *Sunnyside Co. v. Reitz,* 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Full value allowed where an adjoiner has willfully overstepped his ground.—*Lightner Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913E, 1093, 120 P. 771.

In trespass the presumption is that the taking was willful.—*Liberty Bell Co. v. Smuggler Co.*, 203 F. 796, 122 C. C. A. 113; *Central Co. v. Penny*, 173 F. 340, 97 C. C. A. 600. But where claim of right is shown the measure of damages is reduced to the value of the mineral or timber in its original place and no more.—*Central Co. v. Penny, supra.*

A lessee holding over under claim of right is not a willful trespasser and is to be allowed the cost of mining.—*Montrozona Co. v. Thatcher*, 19 Colo. App. 371, 75 P. 595.

Negligence to ascertain boundaries does not make necessarily a willful trespasser, but a deliberate intention to remain ignorant of boundaries does so.—*Resurrection Co. v. Fortune Co.*, 129 F. 668, 64 C. C. A. 180.

Plaintiff may prove assays of ore left standing and computations of what was taken from the stopes—but an averaging estimate of how much each miner might have broken is too remote.—*Golden R. Co. v. Buxton Co.*, 97 F. 413, 38 C. C. A. 228.

Value of ore elsewhere on same lode is admissible in proving damages for ore taken.—*Montana M. Co. v. St. Louis Co.*, 183 F. 51, 105 C. C. A. 343.

In *Omaha Co. v. Tabor*, 16 M. R. 184, 13 Colo. 41, 16 Am. St. Rep. 185, 5 L. R. A. 236, 21 P. 925, the Court adopted the value of the ore when it became a chattel by severance from the realty. That is the rule where there was no *bona fide* claim of right, and under the circumstances of that case was an extreme ruling and against the almost unbroken weight of authority.

Central Coal Co. v. Penny, 173 F. 340, 97 C. C. A. 600, is a case reviewing the items of mitigation to reduce the damages.

Instructions in trespass for recovery of value of ores taken, reviewed and held to be correct.—*Montana M. Co. v. St. Louis M. Co.*, 147 F. 897, 78 C. C. A. 33.

Where the Mine Is Under Lease and Ore Is Taken by trespass, the lessee can recover in trover or trespass.—*Hartford Co. v. Cambria Co.*, 93 Mich. 90, 32 Am. St. Rep. 488, 17 M. R. 515, 53 N. W. 4; *Attersoll v. Stevens*, 10 M. R. 67, 1 Taunt. 183. And the lessor may recover to the extent of his royalty.—*Stockbridge Co. v. Cone Works*, 6 M. R. 317, 102 Mass. 80. Where the lessor treats disputed ground as his own he is liable to the owner for coal taken by his lessee.—*Dundas v. Muhlenberg*, 14 M. R. 437, 35 Pa. 351. The same as to an oil lease to the full value of the leasehold interest.—*Duffield v. Rosenzweig*, 144 Pa. 520, 23 Atl. 4.

Where the lessor accepts royalties knowing the lessee has overstepped his bounds, both may be held in the same action and the proceeds of ores held by the smelter may be treated as a fund to secure the payment.—*Zobel v. Fannie Rawlings Co.*, 49 Colo. 134, 111 P. 843.

Suit by Ousted Lessee.

A lessee wrongfully ousted by his lessor is entitled to recover the profits he would have realized on adequately proving the same.—*Smuggler Union Co. v. Kent*, 47 Colo. 320, 112 P. 223. The case discusses the difficulty of proving such fact and reversed the lower Court for allowing inadmissible evidence. See also *Providence Co. v. Nicholson*, 178 F. 29, 101 C. C. A. 157. In *Hoosac Co. v. Donat*, 10 Colo. 529, 16 P. 157, the opinion on this point is abrupt and fails to compensate the lessee.

Where the lessor later mined out the ground, such evidence was under the defendant's control, and in such case every reasonable intendment will be made to support a verdict against the lessor.—*Isabella M. Co. v. Glenn*, 37 Colo. 165, 86 P. 349.

By Licensee.

A licensee (a buyer holding under executory contract of purchase) has no right of action for coal taken by trespass,

except for the coal actually mined by the licensee.—*Caledonian Co. v. Rocky Cliff C. Co.*, 16 N. M. 517, 120 P. 716.

The sale of land does not convey the right of action for trespasses committed before the sale.—*Id.*

In a California case a plaintiff in possession under deed in escrow not delivered was allowed to recover against an adjoiner who had taken ore from the claim.—*Lightner Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913E, 1093, 120 P. 771.

Special Injury to the Mine Can Not, in Trespass, Be Proved as damages, unless specially declared for.—*Patchen v. Keeley*, 19 Nev. 404, 14 P. 347.

Confusion.

Mixture of ore got by trespass with ore rightfully mined does not necessarily bring the case within the rule as to confusion of goods.—*Maloney v. King*, 30 Mont. 158, 76 P. 4.

Natural gas company held to extreme measure of damages where it had fraudulently mingled lessors' gas without keeping any account of it.—*Stone v. Marshall Co.*, 208 Pa. 85, 101 Am. St. Rep. 904, 65 L. R. A. 218, 57 Atl. 183; *Great S. Co. v. Logan Co.*, 155 F. 114, 83 C. C. A. 574.

Mesne Profits—Accounting.

At common law a plaintiff out of possession could not recover for the ore taken until he had recovered possession by ejectment.—*Hugunin v. McCunniff*, 14 M. R. 463, 2 Colo. 367.

This is changed by statute in Colorado.—R. S. Sec. 4219. The plaintiff may recover the land and damages in a single action or by separate suits.—Code, Sec. 291. The case of *Ghost v. Shuman*, 4 Colo. App. 88, 34 P. 733, which holds that they must be recovered in the original action, entirely overlooks this section.

Where there were two adjoining claims with conflicting apex rights, in accounting between them for ores taken, cost of min-

ing is to be deducted, and the rise in value of the price of ore is not to be added to the recovery.—*Clark Montana Co. v. Butte Co.*, 233 F. 548.

Venue in Trespass.

Whether trespass on real estate is a local or a transitory action—whether it can be brought in one State for injuries done in another—depends on the legislation or decisions of the particular State. The question is fully discussed in *Peyton v. Desmond*, 129 F. 1, 63 C. C. A. 651.

Miscellaneous Cases.

For the measure of damages on refusal to accept deed, see *Gilpin M. Co. v. Drake*, 8 Colo. 586, 9 P. 787. On breach of contract to lease.—*Chambers v. Brown*, 69 Ia. 213, 28 N. W. 561. In cases of negligence.—*Moody v. McDonald*, 4 Cal. 297, 2 M. R. 185, 187. On tunnel contract.—*Monroe v. Northern P. Co.*, 5 Or. 509, 2 M. R. 652. Against lessor for mining the ground leased.—*Chamberlain v. Collinson*, 9 M. R. 37, 45 Iowa 429. Against lessee for breach of covenants to mine.—*Cleopatra Co. v. Dickinson*, 28 Wash. 211, 68 P. 456; *Colorado Fuel Co. v. Pryor*, 25 Colo. 540, 57 P. 51, 19 M. R. 544; *Macon v. Trowbridge*, 38 Colo. 330, 87 P. 1147. Against smelter fumes.—*Park v. Northport Sm. Co.*, 47 Wash. 597, 92 P. 442.

On a contract to make a mine a "dividend producer" with stock deposited as forfeit, plaintiff was not allowed to recover damages in addition to the forfeit.—*Catterlin v. Voney*, 177 F. 527.

On contract to furnish funds to drill for coal and to form a company and issue stock in payment for land.—*Eisleben v. Brooks*, 179 F. 86, 102 C. C. A. 380.

Measure of damages on fraudulent sale of mine or stock is the difference between the value received and the value parted with.—*Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. Ed. 279, 16 M. R. 159; *Warner v. Benjamin*, 89 Wis. 290,

62 N. W. 179; *Stratton's Ind. v. Dines,* 135 F. 449, 68 C. C. A. 161.

Conversion of stock of no fixed market value.—*Moynahan v. Prentiss,* 10 Colo. App. 295, 51 P. 94.

On sale of coal.—*Osgood v. Bauder,* 75 Ia. 550, 1 L. R. A. 655, 39 N. W. 887. For stoppage of work on contract to sink, before shaft complete.—*Mooney v. York Co.,* 82 Mich. 263, 46 N. W. 376.

Heavy verdict sustained for breach of contract to drive drainage tunnel.—*Occidental M. Co. v. Comstock T. Co.,* 125 F. 244.

The measure of damages for breach of contract by lessor to drain the mine is the cost of restoring it to its condition before injury accrued, but this can not exceed the value of the unexpired portion of plaintiff's term.—*Carter v. Cairo Co.,* 240 Ill. 152, 88 N. E. 493.

NEGLIGENCE. ACCIDENTS.

The same rule governs the liabilities of owners, lessees and contractors in case of accident to employees, as controls in other cases where the relation of master and servant exists, and *negligence* is the foundation of the action.—*Quincy Co. v. Hood,* 12 M. R. 148, 77 Ill. 68; *Strahlendorf v. Rosenthal,* 10 M. R. 676, 30 Wis. 674; *Central C. Co. v. Williams,* 173 F. 337, 97 C. C. A. 597.

Safe place to work defined.—*Dolese Co. v. Kahl,* 203 F. 627, 122 C. C. A. 23. Mining is a dangerous business and subject to State regulation under its police power.—*Barrett v. Indiana,* 229 U. S. 26, 33 Sup. Ct. Rep. 692, 57 L. Ed. 1050. Compelling owner to leave barriers is no unreasonable exercise of such power.—*Plymouth Co. v. Com.,* 232 U. S. 531, 34 Sup. Ct. Rep. 359, 58 L. Ed. 713. The servant assumes only risks which are obvious after the master has performed his duty.—

Blair v. Spokane, 66 Wash. 399, 119 P. 839. The miner does not forfeit his right to protection during intervals of labor.—*Mammoth M. Co. v. Thomas,* 201 F. 297, 119 C. C. A. 535. The mine operator is chargeable with implied notice of facts upon which danger may be predicated, without proof of actual notice.— *Kinsel v. North Butte Co.,* 44 Mont. 445, 120 P. 797.

The Degree of Care Required of the Master Is Fully Stated in *Southwest Co. v. Smith,* 85 Va. 306, 17 Am. St. Rep. 59, 7 S. E. 365. The miner has no recovery for the ordinary and unavoidable risks of the business.—*Cherokee Co. v. Britton,* 3 Kan. App. 292, 45 P. 101.

Instances of Responsibility.

The employer is liable for failure to timber dangerous ground.—*Trihay v. Brooklyn Co.,* 15 M. R. 535, 4 Utah 468, 11 P. 612; *Sampson Co. v. Schaad,* 15 Colo. 197, 25 P. 89, 11 M. R. 362; *Mountain Cop. Co. v. Van Buren,* 133 F. 1, 66 C. C. A. 151. Or for failure to observe his own code signals.—*Silver Cord Co. v. McDonald,* 14 Colo. 191, 23 P. 346, 16 M. R. 171. Or defective rope or hoisting gear.—*New York Co. v. Rogers,* 11 Colo. 6, 7 Am. St. Rep. 6, 16 P. 719, 17 M. R. 123; *Myers v. Hudson Co.,* 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631; *Donnelly v. Booth Co.,* 90 Me. 110, 37 Atl. 874. Or for scales, the fall of which should have been foreseen.—*Buckley v. Port Henry Co.,* 2 N. Y. Supp. 133, 49 Hun 609; *Union P. Ry. v. Jarvi,* 53 F. 65, 3 C. C. A. 433; *Wilson v. Alpine Co.,* 118 Ky. 463, 81 S. W. 278; *La Follette Co. v. Minton,* 117 Tenn. 415, 11 L. R. A. (N. S.) 478, 101 S. W. 178. For a preventable cave.—*James v. Emmett Co.,* 55 Mich. 335, 21 N. W. 361; *Pantzar v. Tilly Co.,* 99 N. Y. 368, 2 N. E. 24. For rotten or broken ladder.—*Reese v. Morgan Co.,* 17 Utah 489, 54 P. 759; *Gold Hunter Co. v. Johnson,* 233 F. 849. For sending men into a blind upraise known to be filled with bad air.—*Portland Co. v. Flaherty,* 111 F. 312, 49 C. C. A. 361, 21 M. R. 555.

The mine owner must look to the proper support of his gangways and to the timbering and to the machinery above.—*Quincy Co. v. Hood, supra; Strahlendorf v. Rosenthal, supra; Ardesco Co. v. Gilson,* 63 Pa. 146, 10 M. R. 669; *Soyer v. Great Falls Co.,* 15 Mont. 1, 37 P. 838. Failure to examine gangways.—*Ashland Co. v. Wallace,* 101 Ky. 626, 42 S. W. 744, 43 S. W. 207.

The master's negligence is not one of the risks which the miner assumes.—*Southern C. Co. v. Swinney,* 149 Ala. 405, 42 So. 808.

That an engineer disobeyed orders in doing what brought about the accident is no defense.—*Lewis v. Mammoth M. Co.,* 33 Utah 273, 15 L. R. A. (N. S.) 439, 93 P. 732.

The miner has a right to assume that the roof is safe.—*Vanesse v. Catsburg Co.,* 159 Pa. 403, 28 Atl. 200. The same as to the machinery.—*Myers v. Hudson Co.,* 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631. The same as to mine passage ways.—*Jackson v. Yak M. Co.,* 51 Colo. 551, 119 P. 1058.

The master is responsible when the accident can be traced directly to his own fault or the fault of his partner.—*Mellors v. Shaw,* 9 M. R. 678, 1 B. & S. 437. And generally where traceable to the fault of the superintendent or foreman.

He is liable for overspeeding the cage.—*Jos. Taylor Co. v. Dawes,* 220 Ill. 145, 77 N. E. 131. And for failure to lag where lagging was customary and necessary.—*Friel v. Kimberly-Montana Co.,* 34 Mont. 54, 85 P. 734.

It is the duty of the employer to inform an inexperienced miner of dangers known or which ought to be known.—*Low Moor Iron Co. v. La Bianca,* 106 Va. 83, 9 Ann. Cas. 1177, 55 S. E. 532; *Pocahontas Co. v. Williams,* 105 Va. 708, 54 S. E. 868.

Degree of care required of owner of pipe line to prevent the oil catching fire.—*Jennings v. Davis,* 187 F. 703, 109 C. C. A. 451.

Blasting—Explosions—Gas.

It is the absolute duty of the master to give warning of a blast.—*Hjelm v. Western Gr. Co.,* 94 Minn. 169, 102 N. W. 384; *Bellevue Co. v. Mooney,* 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764, 19 M. R. 264.

The owner is liable for accidents resulting from experimenting with new and untried fuse or explosives.—*Smith v. Oxford Co.,* 42 N. J. L. 467, 36 Am. Rep. 535, 2 M. R. 208; *Chambers v. Chester,* 172 Mo. 461, 72 S. W. 904; *Hedlun v. Holy Terror Co.,* 16 S. D. 261, 92 N. W. 31. Or for setting new employees at work fitting caps.—*Rillston v. Mather,* 44 F. 743; *Mather v. Rillston,* 156 U. S. 391, 15 Sup. Ct. Rep. 464, 39 L. Ed. 464, 18 M. R. 165. Or storing magazines too close to works.—*Bean v. Pioneer Co.,* 66 Cal. 451, 56 Am. Rep. 106, 6 P. 86; *Asbestos Co. v. Durand,* 20 M. R. 452, 30 Canada 285. He must use all appliances readily obtainable known to science to prevent gas explosions.—*Western Co. v. Berberich,* 94 F. 329, 36 C. C. A. 364.

The duty of the master to warn against a blast is one that can not be delegated to a fellow servant.—*Hendrickson v. U. S. Gypsum Co.,* 133 Iowa 89, 12 Ann. Cas. 246, 9 L. R. A. (N. S.) 555, 110 N. W. 322.

Inexperienced miners have the right to be instructed as to the dangerous character of dynamite.—*Pinney v. King,* 98 Minn. 160, 107 N. W. 1127.

Furnishing a steel bar to tamp powder is gross negligence.—*Pitts v. Wells,* 31 Ky. L. 208, 101 S. W. 1192.

Action for gas explosion. Plaintiff is not bound to show how the gas was lighted.—*Luengene v. Consumers Co.,* 86 Kan. 866, 122 P. 1032.

In blasting near houses the blast should be smothered.—*Kimberly v. Howland,* 143 N. C. 398, 7 L. R. A. (N. S.) 545, 55 S. E. 778. And in *Louden v. Cincinnati* it was held that the city was liable whether it used due care or not.—90 Ohio St.

144, Ann. Cas. 1916C, 1171, L. R. A. 1915E, 356, 106 N. E. 970.

Misfire.

Consideration of what is reasonable time to wait for blast.—*Eureka Co. v. Bass,* 81 Ala. 200, 6 Am. Rep. 152, 8 So. 216. Full case on.—*Anderson v. Daly Co.,* 16 Utah 28, 50 P. 815.

Examination should be made and new shift notified of missed shot.—*Lane Co. v. Bauserman,* 103 Va. 146, 106 Am. St. Rep. 872, 48 S. E. 857; *Harris v. Balfour Co.,* 137 N. C. 204, 49 S. E. 95; *Allen v. Bell,* 32 Mont. 69, 79 P. 582.

Defendant held for allowing green hand to pick missed shot.—*Peters v. George,* 154 F. 635, 83 C. C. A. 408.

An employer is liable where, neglecting his unvarying custom, he fails to investigate for a misfire.—*Bjorklund v. Gray,* 106 Minn. 42, 118 N. W. 59.

Whether it is negligence to fire several shots so as to go off with one report and so render it impossible to tell whether one or more were missed shots, is a question of fact for the jury.—*Jobe v. Spokane Co.,* 73 Wash. 1, 48 L. R. A. (N. S.) 931, 131 P. 235.

Safeguarding Shafts.

Construction of the Colorado Act requiring abandoned shafts to be safeguarded.—*Richardson v. El Paso M. Co.,* 51 Colo. 440, 449, 118 P. 982.

The miner assumes only known dangers or those which he should have ascertained. The case was: Falling into an unguarded ore shoot.—*Gregoric v. Percy-La Salle Co.,* 52 Colo. 495, Ann. Cas. 1913E, 1030, 122 P. 785.

The Lessor Is Not Liable for the Lessee's Negligence.

—*Smith v. Belshaw,* 89 Cal. 427, 26 P. 834. Otherwise, when he lets machinery already out of condition.—1 Thomp. Neg. 317.

Under Contractor.

The mine owner is not in general liable for accidents occurring under a contractor.—*Lendberg v. Brotherton Co.,* 75 Mich. 84, 42 N. W. 675; *Welsh v. Lehigh Co.* (Pa.), 5 Atl. 48. But is liable where contractor is known to be incompetent.—*Huntt v. M'Namee,* 141 F. 293, 72 C. C. A. 441. Or where the owner reserves control of the work.—*Tennessee Co. v. Burgess,* 158 Ala. 519, 47 So. 1029.

Contributory Negligence—Co-Employee.

The mine owner, as a general rule, is not liable when the accident was in whole or in part attributable to the negligence of the party injured or to the carelessness of a fellow workman not occupying a directing or superior position to the party injured.—*Kevern v. Prov. Co.,* 70 Cal. 392, 11 P. 740; *Ardesco Co. v. Gilson,* 63 Pa. 146, 10 M. R. 669; *Berea Co. v. Kraft,* 31 Ohio St. 287, 27 Am. Rep. 510, 10 M. R. 16; *Trihay v. Brooklyn Co.,* 15 M. R. 535, 4 Utah 468, 11 P. 612; *Colorado Midland Ry. Co. v. O'Brien,* 16 Colo. 220, 27 P. 701. It is not necessarily contributory negligence to use fire for comfort when dynamite is being thawed.—*Bertha Co. v. Martin,* 93 Va. 791, 70 L. R. A. 999, 22 S. E. 869.

Knowledge of danger is not always contributory negligence. —*Blaire v. Spokane,* 66 Wash. 399, 119 P. 839.

Contributory negligence is no defense to accident caused by willful neglect of statutory duty.—*Chicago Co. v. Fidelity Co.,* 130 F. 957; *Fulton v. Wilmington Co.,* 133 F. 193, 68 L. R. A. 168, 66 C. C. A. 247.

Miners working under different superintendents are not fellow servants.—*Uren v. Golden T. Co.,* 24 Wash. 261, 64 P. 174, 21 M. R. 243.

Negligence of fellow servant is no defense if the master knew of the danger.—*Hancock v. Keene,* 5 Ind. App. 408, 32 N. E. 329. That the accident was chargeable to a co-employee is no longer a defense in Colorado.—R. S. Secs. 2064, 2065.

Assumption of risk and contributory negligence must be specially pleaded.—*Foley v. Pioneer Co.,* 144 Ala. 178, 40 So. 274.

An employee does not assume the risk arising from the employment of an incompetent fellow servant.—*Majestic Co. v. McCoy,* 132 Ky. 533, 116 S. W. 738.

Remaining in Employ After Danger Known Is Held in instances to be a defense.—*Lord v. Pueblo Co.,* 12 Colo. 390, 21 P. 148; *Davis v. Graham,* 2 Colo. App. 210, 29 P. 1007. It is technically classed as contributory negligence, though this is a mere abuse of terms; it is only acquiescence perhaps from moral necessity, in the negligence of the master, perhaps criminal in degree. It is hard for the reasoning powers of man to conclude that this does not amount to a premium on negligence.

If the master promise to repair, the workman may rely on the promise and remain.—*Highland Boy Co. v. Pouch,* 124 F. 148, 154, 61 C. C. A. 40; *Gold Hunter Co. v. Johnson,* 233 F. 849.

A miner may know of the facts which bring about danger without necessarily knowing that danger exists.—*Bird v. Utica M. Co.,* 2 Cal. App. 674, 84 P. 256; *Mascot Co. v. Garrett,* 156 Ala. 290, 47 So. 149.

First Aid to Injured.

It is the duty of a mining company to render first aid to those injured in its employ.—*Cushman v. Cloverland C. Co.,* 170 Ind. 402, 127 Am. St. Rep. 391, 16 L. R. A. (N. S.) 1078, 84 N. E. 759.

REPLEVIN.

Ore Taken Under Claim of Title.

Where a party is in possession of a mine under a *bona fide* claim of title, the party out of possession can not maintain replevin, or an action under the code in the nature of replevin, for the ore taken from the same, because the trial of the right of property in the ore in such case would necessarily involve the trial of the title to real estate. The cases sustaining this proposition are cited *ante* p. 432.

In a case of replevin for ore in Montana which brought up the question of apex right, the Court took the novel and indefensible position that it involved no dispute as to title and was only a matter of boundaries.—*Driscoll v. Dunwoody*, 7 Mont. 394, 16 P. 726.

Defendant can not re-replevin ore.—*Morris v. DeWitt*, 12 M. R. 680, 5 Wend. (N. Y.) 71.

INJUNCTION.

At some stage of its progress a contest over a working mine is almost sure to suggest this sort of relief. It is true that the prayer for an injunction is always to a certain extent addressed to the discretion of the Court, but the exercise of this discretion does not imply the total absence of principles applicable to the exercise of discretion.

The Ground of the Application for Injunctive Relief Is that the property may be preserved pending litigation for the ultimate use of the rightful owner and may not in the meanwhile be destroyed by a trespasser. But the pendency of litigation is not of itself sufficient; the complainant must go farther and show that his case is based upon substantial facts, and that there is a probability of a decision in his favor when the

cause is tried on its merits. As he asks relief in advance of the trial, it is only just that he make it appear that the trial when had will show that he was in fact entitled to this protection; and especially so when a decree of this sort, wrongfully issued, may be and often is as great an injury to the defendant as the conversion of some of the ore is to a rightful complainant.—*Capner v. Flemington Co.*, 7 M. R. 263, 3 N. J. Eq. 467; *Clavering v. Clavering*, 14 M. R. 358, 2 P. Wms. 388; *Irwin v. Davidson*, 7 M. R. 237, 3 Ir. Eq. 311.

Parties.

One who has a contract to sink an oil well entered into before the suit, is not bound by an injunction against his employer.—*Dunham v. Seiberling*, 12 Ind. App. 210, 39 N. E. 1044. Lessees should be made parties.—High Inj., Sec. 690; *Doctor Co. v. Marsh*, 216 F. 261.

A lessee or licensee may be entitled to the protection of the writ even against the owner.—*Lytle v. James*, 98 Mo. App. 337, 73 S. W. 287; *Jack Harvard Co. v. Continental Co.*, 106 Mo. App. 66, 80 S. W. 12.

The Right of Lessees to Protection Against the Owner and

those working adjoining works is construed in *Peterson v. Bullion Co.*, 32 Utah 20, 14 Ann. Cas. 1122, 91 P. 1095, 41 Utah 364, 126 P. 310.

Laches.

To entitle him to injunctive relief the complainant must not have been guilty of unreasonable delay nor have allowed the defendant to proceed without objection to expend money in good faith upon the property.—*Klein v. Davis*, 11 Mont. 155, 27 P. 511; *Parrott v. Palmer*, 3 M. & K. 632; *Real del Monte Co. v. Pond Co.*, 7 M. R. 452, 23 Cal. 82; *Emma Mine case*, 2 Leg. Gaz. 81, 7 M. R. 493; *Field v. Beaumont*, 1 Swanst. 204, 7 M. R. 257; *Mammoth Co.'s Appeal*, 54 Pa. 183, 7 M. R. 460;

Patterson v. Hewitt, 11 N. M. 1, 55 L. R. A. 658, 66 P. 552; *Consumers' Co. v. American Co.,* 162 Ind. 393, 68 N. E. 1020.

The Solvency or Insolvency of the Defendant, as Well as many other circumstances applicable to particular cases, may be taken into account, but is not a controlling consideration when the case is otherwise clear.—*Lockwood v. Lunsford,* 7 M. R. 532, 56 Mo. 68; *Hamilton v. Ely,* 4 Gill. (Md.) 34; *Sierra Co. v. Sears,* 7 M. R. 549, 10 Nev. 346; *Moore v. Ferrell,* 1 Ga. 7, 7 M. R. 281; *Irwin v. Davidson,* 3 Ir. Eq. (38 N. C.) 311; *Parker v. Furlong,* 37 Or. 248, 62 P. 490.

Discretion.

The granting of the writ is so largely in the discretion of the lower Court that only in an extreme case will the Appellate Court interfere with the order allowing or refusing it.—*Parrot S. Co. v. Heinze,* 24 Mont. 485, 62 P. 818, 21 M. R. 98; *Cardelli v. Comstock Co.,* 21 M. R. 699, 26 Nev. 284, 66 P. 950; *Vogel v. Warsing,* 146 F. 949, 77 C. C. A. 199; *Bush v. Pioneer Co.,* 154 F. 480, 83 C. C. A. 320.

In doubtful cases the courts favor the writ.—*Stewart Co. v. Ontario Co.,* 23 Ida. 280, 129 P. 932.

The Court has power to withhold the writ when the plaintiff refuses to do equity or where it would place one party in the power of the other.—*Strobel v. Kerr Salt Co.,* 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 58 N. E. 142, 21 M. R. 39.

Title in Issue.

In cases where a determination of the legal title is necessary to finally decide the rights of the parties, the complaint should be framed to procure an issue of that sort; or a previous suit must be pending which will result in determining the title; or a separate action must be brought for such purpose. If no suit be pending to try title, the Court may order such suit to

be brought as a condition precedent to the granting of the writ.—*U. S. v. Parrott,* Fed. Cas. No. 15,998, McAll. 271, 7 M. R. 335; *Grey v. Northumberland,* 13 Ves. 235, 7 M. R. 250; *Old Telegraph Co. v. Central Co.,* 1 Utah 331, 7 M. R. 555. And such has been the common practice in the Federal Court. —*Stevens v. Williams,* 5 M. R. 449.

A plaintiff in possession is not required to bring his action at law.—*Allen v. Dunlap,* 24 Or. 229, 33 P. 675. The writ may issue to preserve the property when the issue is between contestants in an equity case.—*St. Louis Co. v. Montana Co.,* 58 F. 129, 17 M. R. 658. The writ will not go when the plaintiff's title is not clear and the legal remedy is adequate.—*Smith v. Jameson,* 91 Mo. 13, 3 S. W. 212.

Where there is one case pending which brings up all questions of apex rights between the parties, the filing of future actions raising such issues will be enjoined.—*Maloney v. King,* 30 Mont. 414, 76 P. 939.

Preservation of the Property.

The gist of the case and the foundation of equity jurisdiction is to save the property from destruction pending the litigation.—*Thomas v. Oakley,* 7 M. R. 254, 18 Ves. 184; *Hess v. Winder,* 34 Cal. 270; *West Point Co. v. Reymert,* 45 N. Y. 703, 7 M. R. 528; *Hoy v. Altoona Co.,* 136 F. 483; *McGuire v. Boyd C. Co.,* 236 Ill. 69, 86 N. E. 174.

The United States may protect its oil lands by injunction.—*El Dora Co. v. U. S.,* 229 F. 946.

Case Sufficient to Warrant Injunction.

To reduce the matter to terms it may be stated as a proposition, supported everywhere by authority, that a temporary injunction, pending suit to try title, will issue as of right to restrain the working of a mine, upon a case which shows, after hearing on bill, answer and testimony:

1. That the complainant has the legal title or the elder and better possessory title; or at least such showing of title as would, if proved as

stated in the bill, support the verdict of a jury in an action of ejectment; and where the defense suggested in the answer does not show a recovery by plaintiff impossible as a proposition of law; and the affidavits or depositions being considered the weight of evidence is with complainant upon the question of fact; and that the defendant is in possession taking out ore (which of itself is a destruction of the estate) in such considerable quantity as to threaten irreparable injury.

St. Louis Co. v. Montana Co., 58 F. 129, 17 M. R. 658; *Parrot Co. v. Heinze*, 24 Mont. 485, 62 P. 818, 21 M. R. 98; *More v. Massini*, 32 Cal. 590, 7 M. R. 455; *Magnet Co. v. Page Co.*, 9 Nev. 346, 7 M. R. 540; *Lockwood v. Lunsford*, 56 Mo. 68, 7 M. R. 532; *Bettmann v. Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271, 18 M. R. 500; *Erhardt v. Boaro*, 15 M. R. 447, 113 U. S. 537, 5 Sup. Ct. Rep. 565, 28 L. Ed. 1116; *Anaconda Co. v. Butte Co.*, 17 Mont. 519, 43 P. 924.

2. That the bill was brought without needless delay, and that the defendant has not been allowed or encouraged to expend large sums of money upon the property, which it was in the power of complainant to prevent.

Ernest v. Vivian, 33 L. J. Ch. 513, 8 M. R. 205; *Klein v. Davis*, 11 Mont. 155, 27 P. 511, and other cases above cited.

And as matters more particularly addressed to the discretion of the Court are the insolvency of defendant, threats of violence and danger of personal collisions, the fact of reckless mining, without regard to the permanent preservation of the mine, etc.

The above propositions are made upon the supposition of an application for injunction after notice, appearance and answer.

Insufficient Case.

An injunction should not issue where defendant will suffer greater injury by the writ than the plaintiff by the wrong.—*Lloyd v. Catlin Co.* 210 Ill. 460, 71 N. E. 335; *Berkey v. Berwind-White Co.*, 220 Pa. 65, 16 L. R. A. (N. S.) 851, 69 Atl. 329.

Where defendants are solvent and injury slight or capable of redress at law, injunction should be denied.—*King v. Mul-*

lins, 27 Mont. 364, 71 P. 155; *Harley v. Montana Co.*, 27 Mont. 388, 71 P. 407, 22 M. R. 550; *Hicks v. American Co.*, 207 Pa. 570, 65 L. R. A. 209, 57 Atl. 55.

It is an abuse of discretion to enjoin the working of a vein on the mere chance that it may apex outside of defendant's ground.—*Montana Co. v. Boston Co.*, 22 Mont. 159, 56 P. 120, 20 M. R. 1.

The courts will not forbid working for exploration purposes. —*St. Louis Co. v. Montana Co.*, 58 F. 129, 17 M. R. 658. And it is assumed as matter of course that courts will not enjoin a mere prospect, but such case rarely reaches the Appellate Court so as to be reported and cited.

Courts will not enjoin in cases charged with doubt or where, on the plaintiff's showing, final relief would not be granted.— *Crescent Co. v. Silver King Co.*, 14 Utah 57, 45 P. 1093. Though to enjoin they will not require so strong a case as on final hearing.—*Buskirk v. King*, 72 F. 22, 18 C. C. A. 418. And it may be allowed although the proving up is not yet complete. —*Maloney v. King*, 25 Mont. 188, 64 P. 351, 21 M. R. 278.

The distinction between the class of cases where injunction will issue to restrain timber cutting and where it will be treated as a mere trespass remediable only at law is well stated in *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164.

An oil well which as yet has struck nothing is not doing irreparable injury.—*Martin v. Danziger*, 21 Cal. App. 563, 132 P. 284.

Inspecific Decree.

A writ will not be allowed against "working any vein having its apex in complainants' claim." This would require defendants to ascertain from what acts they are enjoined.— *St. Louis Co. v. Montana Co., supra.* But in *Clark Montana Co. v. Butte Co.*, a suit to quiet title, it was held that the decree could not be more specific in such a case than the development on surface, and was allowed in general terms.—233 F. 548.

Injuries Other Than Mining Ore.

An injunction will issue to restrain the destruction of flumes or ditches.—*Power v. Klein,* 11 Mont. 159, 27 P. 513; *Miocene D. Co. v. Jacobsen,* 146 F. 680, 77 C. C. A. 106. Or a pipe line. —*Brookshire Oil Co. v. Casmalia Co.,* 151 Cal. 577, 91 P. 383. Or to stay the running of an incline drift to cut off an adversary's tunnel.—*Montana Co. v. Clark,* 16 M. R. 81, 42 F. 626. Against assaulting workmen and threats to blow up the mine.—*Rankin's Appeal* (Pa.), 16 Atl. 82. Against sale of mining stock on the ground of its fluctuating value.—*McLure v. Sherman,* 70 F. 190; *Currie v. Jones,* 138 N. C. 189, 50 S. E. 560. Refused against cutting timber on claim where defendant solvent and the timber of no special need to the mine.—*Heaney v. Butte Co.,* 10 Mont. 590, 27 P. 379. Refused against use of adits underlying plaintiff's ground.—*Boston Co. v. Montana Co.,* 23 Mont. 557, 59 P. 919.

It may be allowed against an option holder in default in his installments.—*Williams v. Long,* 129 Cal. 229, 61 P. 1087, 20 M. R. 738. A defendant can not be enjoined from "entering or trespassing upon" ground of which he is already in possession.—*Id.*

Defendant enjoined from dumping with election to remove the deposited waste or pay damages.—*White v. Lansing,* 119 App. Div. 584, 103 N. Y. Supp. 1040.

Where a claim had been located over plaintiff's right of way, the title being in dispute, the Appellate Court modified the injunction against the miners so as to allow both mine and road to be operated pending the trial.—*Chicago Ry. v. Ferrell,* 20 Ida. 680, 119 P. 703.

The diversion of water previously appropriated for power purposes should be enjoined; decree quieting complainant's title is not adequate relief.—*Trade Dollar M. Co. v. Fraser,* 148 F. 585, 79 C. C. A. 37.

A party against whom a judgment in trespass for taking ore is being sought may be enjoined for the protection of the an-

ticipated judgment.—*Montana Co. v. St. Louis Co.*, 168 F. 514, 93 C. C. A. 536.

Negative covenants in coal lease enforced by injunction.—*Sharum v. Whitehead*, 223 F. 282, 138 C. C. A. 524.

Nuisance Cases—Tailings and Fumes.

In a proper case an injunction should issue to restrain deposit of tailings.—*Fuller v. Swan River Co.*, 12 Colo. 12, 19 P. 836, 16 M. R. 252. Refused against upper mill where it is using all possible effort to restrain its tailings.—*Otaheite Co. v. Dean*, 102 F. 929, 20 M. R. 688.

Injunction against pollution of stream, with leave to defendant to apply for modification.—*Arizona Copper Co. v. Gillespie*, 230 U. S. 47, 33 Sup. Ct. Rep. 1004, 57 L. Ed. 1384.

The case of *Bliss v. Anaconda Co.*, 167 F. 342, was a test case by the farming interests against the immense copper smelter at Butte. The Court refused the injunction prayed for, but held the case open in hope of an equitable adjustment.

For another instance where the relief prayed for would involve the destruction of large vested interests, see *McCarthy v. Bunker Hill Co.*, 164 F. 927, 92 C. C. A. 259.

Practice—Answer Not Conclusive.

As a rule, in equity pleading where the defendant denies the allegations of the bill in terms, the writ will not issue; but where the bill is supported by affidavits, and is filed to restrain irreparable mischief by the working of a mine, and the bill, answer and supporting affidavits being considered together, the case appears as stated—for the preservation of the subject matter of the controversy and as a rule limited in its application to mining cases and others standing on analogous facts, where the substance and not merely the use is in jeopardy—the answer is not to be taken as conclusive, if there remain to the complainant such a showing as is above stated.

Plaintiff held entitled to injunction against violence, although all allegations of complaint denied by the answer. The practice in mining litigation is liberal to enjoin to prevent either party from getting unfair advantage.—*Safford v. Flemming,* 13 Ida. 271, 89 P. 827.

The Venue Is Usually Fixed by the Code and Commonly in the county where the land lies. When not so fixed, the Court having jurisdiction over the person may enjoin the working of a mine in another county.—*Jennings v. Beale,* 158 Pa. 283, 27 Atl. 948. But not in another State.—*Lindsley v. Union Co.,* 26 Wash. 301, 66 P. 382, 21 M. R. 586; *Johnstown Co. v. Butte Co.,* 60 App. Div. 344, 70 N. Y. Supp. 257. Compare *Butterfield v. Nogales Co.,* 9 Ariz. 212, 80 P. 345.

Notice.

The usual period of notice to defendant is five days, but the statute merely requires a notice "in proportion to the urgency of the case."—Code, Sec. 164. And where the defendant prays further time to answer, it is usual, on slight showing, to grant a restraining order or preliminary writ.

In many States the writ of injunction issues at once upon complainant's showing, and the issue comes before the Court upon motion to dissolve. In Colorado a reasonable notice is required to be given before the writ can issue, which allows the defendant opportunity to file his answer; so that the argument is heard usually upon the original motion for an injunction and not upon the motion to dissolve.

FORM OF INJUNCTION NOTICE.

STATE OF COLORADO, County of *Lake:* ss.
In the District Court of said County.

Benjamin S. Phillips, Plaintiff, v. Frank M. Taylor and Thomas L. Wood, Defendants.—Injunction.

To the above-named Defendants:

You and each of you will take notice that the said plaintiff will apply to *Hon. Charles Mott Cavender,* Judge of said Court, at the court house,

in *Red Cliff*, County of *Eagle*, in said state, at the hour of two o'clock p. m., on the 10th day of *January*, A. D. 1916, or as soon thereafter as counsel can be heard, when and where you may attend as you see fit—for a writ of injunction to restrain and enjoin you and each of you, your agents, attorneys, lessees, sub-lessees, employees, and all persons under or in privity with you, from working, mining, extracting or carrying away ore from the *Fair Deceiver* Lode Mining Claim, situate on *Carbonate Hill*, in *California* Mining District, in said County of *Lake*, and for other relief; and that plaintiff will support the application by the complaint, affidavits, maps and documentary evidence.

Cripple Creek, January 4, 1916.

WM. N. VAILE,
Attorney for Plaintiff.

Ex Parte Writs to Enjoin the Working of a Mine Are Forbidden by statute.—Code, Sec. 164.

It has been ruled that to enjoin the sale or removal of the ore is not an injunction against mining.—*Benton v. Hopkins*, 31 Colo. 518, 74 P. 891. This was an exceptional case, but it is obvious that in most instances such an order would be in violation of the spirit of the Act.

Practice on Hearing.

The notice having been served, the complainant presents his bill of complaint to the Court, or judge at chambers. If the complaint has not been filed or a copy served with the notice, it is usual to allow defendant a reasonable time to answer.

A demurrer is rarely interposed to a bill stating fully the complainant's case. And if interposed and not sustained, the defendant is not in position to ask for time to answer over.

The complainant with his bill, and the defendant with his answer, may file affidavits in support of the bill and answer respectively, and this is usually advisable.

The answer being presented, and denying fully the merits of the bill, the Court may either hear the case on bill, and answer with their supporting affidavits, or refer the matter to a master or referee to take testimony.

The Court may award damages for the ore taken, with the writ on the final hearing.—*Mitchell v. Big Six Co.*, 186 F. 552.

Working Under View of Court.

Where the defendant is solvent and working in miner-like manner and the case of plaintiff not free from doubt, it is not unusual for the Court to allow the defendant to keep at work under conditions of accounting to the Court at monthly intervals, and of submitting to the inspection of some person on behalf of plaintiff and paying the net or gross proceeds into Court, according to the nature of the case and the framing of the order.

An indemnity bond may be required when the defendant is allowed to keep at work.—*Stewart Co. v. Ontario Co.*, 23 Ida. 280, 129 P. 932.

Injunction After Appeal Taken.

The practice is, where the defendant in the suit or issue at law obtains judgment, to dissolve the writ; on final verdict for plaintiff to make the writ perpetual.—*Boston Co. v. Montana Co.*, 26 Mont 146, 66 P. 752. But the lower Court has the power (though it will only be exercised in a case where the appeal has great merit or doubt) to continue the injunction after appeal taken by the plaintiff.—*Bullion Co. v. Eureka Co.*, 5 Utah 182, 12 P. 660; *Maloney v. King*, 27 Mont. 428, 71 P. 469. And in such case the Supreme Court will not interfere with it.—*Sheaffer's Appeal*, 100 Pa. 379. But the appeal itself does not stay the writ or the suspension of the writ.—*Bullion Co. v. Eureka Co.*, 15 M. R. 449, 5 Utah 151, 13 P. 174.

The Appellate Court on remanding may direct the lower Court to order the property preserved by injunction.—*Erhardt v. Boaro*, 113 U. S. 537, 28 L. Ed. 1113, 15 M. R. 447; *Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49 L. Ed. 263.

The Appellate Court may enjoin.—*Ajax Co. v. Triumph Co.*, 30 Colo. 115, 69 P. 523, 22 M. R. 259. But it will generally

leave the matter to the discretion of the Court below.—*Stearns-Roger Co. v. Brown*, 114 F. 940, 52 C. C. A. 559; *McCarthy v. Bunker Hill Co.*, 164 F. 927, 92 C. C. A. 259.

On appeal from an order dissolving an injunction a *supersedeas* continues the writ in force.—*New River Co. v. Seeley*, 117 F. 981.

Malicious Prosecution Will Lie for Suing Out the Writ

without probable cause, and damages, even to the loss of anticipated profits, may be allowed.—*Newark Co. v. Upson*, 40 Ohio St. 17. But it will not lie where there was probable cause.—*Wright v. Ascheim*, 5 Utah 480, 17 P. 125.

Abuse of the Writ.

Where plaintiff, having obtained injunction against defendant's mining, entered upon and took possession of the defendant's works, restoration was ordered on motion.—*Van Zandt v. Argentine Co.*, 48 F. 770, 2 McCrary 642, 7 M. R. 634.

Verification.

Both bill and answer should be verified, and the answer must be sworn to even where the oath of defendant is waived by the proper clause to that effect in the bill. In the latter case the oath has not, indeed, the technical effect of a sworn answer, but the answer has its proper effect as a plea and the further effect of an affidavit of the defendant. As to verification by corporation, see *Butte Co. v. Montana Co.*, 24 Mont. 125, 60 P. 1039.

Bond.

The fact of a bond being filed for the relief of the defendant, if injured, is a protection to him only in theory. A bond is seldom available to the ultimate vindication of the right: it is no lien; the measure of damages is vexed and unsettled.—*Donahue v. Johnson*, 9 Wash. 187, 37 P. 322; *Coosaw Co. v.*

Carolina Co., 75 F. 860. In the Federal Courts the damages may be assessed upon dissolution of the writ.—*Coosaw Co. v. Farmers Co.*, 51 F. 107. There can be no recovery on the bond where the writ was rightfully issued.—*Yarwood v. Cedar Canyon Co.*, 37 Wash. 56, 79 P. 483.

Only counsel fees for obtaining the dissolution, not for defending the suit, are recoverable.—*Donahue v. Johnson*, 9 Wash. 187, 37 P. 322; *Montgomery v. Gilbert*, 24 Mont. 121, 60 P. 1038; *Quinn v. Silka*, 19 Colo. App. 507, 76 P. 555.

Measure of damage where coal mining had been stayed.—*Quinn v. Baldwin Co.*, 19 Colo. App. 497, 76 P. 552.

Extension of Term.

In *Stahl v. Van Vleck* an oil lessee had been allowed five years to complete his well, but the lessor enjoined and kept his work enjoined for a long time. The Court ruled that at the conclusion of the litigation he was entitled to as much time as he had wrongfully lost by the writ.—53 Ohio St. 136, 41 N. E. 35, 18 M. R. 231.

The same ruling was made in *Halla v. Rogers*, where a placer lessee had his term extended by the Court to enable him to work out the ground which the lessor's injunction had stayed. —176 F. 709, 34 L. R. A. (N. S.) 120, 100 C. C. A. 263, 187 F. 778, 109 C. C. A. 626.

Mandatory Writ.

Section 175 of the Colorado Code provides that where possession of a mine is taken by violence or during intervals of labor, a mandatory writ restoring possession shall issue. This act, passed originally in 1874, has been found effective to accomplish the object intended, and the forcible dispossession of parties working a mine is now almost unheard of. It was construed and enforced in *Sprague v. Locke*, 1 Colo. App. 171, 28 P. 142.

A similar act has been sustained by the Supreme Court of Dakota.—*Cole v. Cady*, 2 Dak. 29, 3 N. W. 322.

A hearing under this act goes only to the matter of the unlawful dispossession of the plaintiff and the writ leaves the parties to their legal rights on all other questions as though no such writ had issued.

An injunction mandatory in effect and implying affirmative acts from the defendants or the surrender of possession of premises is an unusual sort of relief, to be granted with great caution, but is not without precedent, even as the result of an interlocutory decree, and without the aid of any such statute. —*Cole Co. v. Virginia Co.*, Fed. Cas. No. 2990, 7 M. R. 516, 1 Sawy. 685; *Lehigh Co. v. Trotter*, 43 N. J. Eq. 185, 7 Atl. 650, 10 Atl. 608; *Horsky v. Helena Co.*, 13 Mont. 229, 33 P. 689.

The object of the act is to allow the Court or Judge to grant speedy and practical relief whenever a party, in peaceable possession, has been ousted by force or fraud, without regard to any question, except the fact and manner of dispossession, and for this object it has been held valid and not unconstitutional by all or nearly all the Judges at *nisi prius*, and has remedied one of the greatest evils ever complained of in the mining counties.

The Federal Court of Colorado District, shortly after the admission of the State, declined to accept jurisdiction under this act. But under the principle laid down in the later case of *Aspen Co. v. Rucker*, 28 F. 222, as to United States Courts exercising equity powers where conferred by State statute, it is likely that its jurisdiction in a case with proper parties would not be at this time questioned.

The practice under the statute is peculiar. As soon as the complaint is filed the Court is directed *ipso facto* to grant a temporary writ restraining the working of the claim. Such mandatory legislative dictation to the judiciary is of very doubtful validity, seeming to take away all judicial discretion, but whatever be its proper construction, the other provisions of the section are not hurt by this isolated provision; they refer merely to the division of time between the parties for taking testimony and for a speedy adjudication, and forbid the use

of such a writ in favor of a party who procured his own possession by violation of the spirit of the act.

In framing bills under this act it is not advisable to pray any relief further than the preliminary writ and the restoration of possession.

At least five days' notice of application must be given; the form on page 467 is sufficient to the words "Writ of Injunction," after which conclude as follows:

Having the force and effect of a writ of Restitution, restoring plaintiff to the possession of the *Fatality* Lode Mining Claim, situated in *Grand Island* Mining District, County of *Boulder*, and for a Temporary Injunction restraining the working of said claim in accordance with the terms of Section 175 of the Code, and that plaintiff will support the application by the complaint and affidavits.

Boulder, January 4, 1916.

LEWIS S. YOUNG,
Attorney for Plaintiff.

County courts are forbidden by Colorado Statute to interfere with the enjoyment, working or possession of a mining claim.—R. S. Sec. 1530.

INSPECTION AND SURVEY.

Under section 398 of the Colorado Code (see also R. S. Secs. 4218, 4230), either party, after suit is commenced, is allowed the privilege of a survey and inspection of the premises held by the adverse party, after demand and refusal, and after certain awkward and useless notices and affidavits—the sections cited being probably the most complete instance of involved and turgid composition ever found on a statute book.

After analysis of its clauses and throwing out such portions as must be discarded in order to give grammatical sense to the paragraph, it seems that the procedure is as follows:

1. A demand in writing is made for permission to survey and inspect some certain portion of the premises.

2. The opposite party has three days in which to consent to or refuse this demand.

3. A refusal being had and the three days elapsed, the party presents to the Court or Judge a petition under oath in which he must set forth his interest in the premises and "the reason why it is necessary" that he should have such survey and inspection; stating the demand made and the refusal, and praying an order for survey and inspection.

4. The Court or Judge then fixes a time and place for hearing this petition and orders notice thereof to be served at least three days before the hearing.

5. On the day set the petition is argued and may be aided or resisted by affidavits.

6. The Court or Judge, if satisfied that the "facts stated in the petition are true," makes the order.

Three inspectors are allowed to accompany the surveyors; an interference with them is made contempt and the costs are taxed against the losing party.

This right of inspection always existed, in Courts of Equity at least, and has been frequently exercised.—*Ennor v. Barwell,* 12 M. R. 101, 1 DeG. F. & J. 529; *Lonsdale v. Curwen,* 3 Bligh O. S. 168, 7 M. R. 693; *Thornburgh v. Savage Co.,* Fed. Cas. No. 13986, 7 M. R. 667; *Dugdale v. Robertson,* 13 M. R. 662, 3 Kay & J. 695; *Lewis v. Marsh,* 8 Hare 97, 8 M. R. 14; *Bennitt v. Whitehouse,* 28 Beav. 119, 8 M. R. 17; *Stockbridge Co. v. Cone Works,* 6 M. R. 317, 102 Mass. 80.

A statute giving power to compel inspection is not unconstitutional or oppressive.—*St. Louis Co. v. Montana Co.,* 9 Mont. 288, 23 P. 510, 17 M. R. 283; *Montana Co. v. St. Louis Co.,* 152 U. S. 160, 14 Sup. Ct. Rep. 506, 38 L. Ed. 398; *In re Carr,* 52 Kan. 688, 35 P. 818; *Howe's Co. v. Howe's Ass'n,* 34 N. Y. Supp. 848. And it may be ordered without statute.—*Blue Bird Co. v Murray,* 9 Mont. 468, 23 P. 1022.

It is now the recognized practice in mining contests, on the application of the party out of possession, to direct a survey of the mine.—*Penny v. Central Coal Co.,* 138 F. 769, 71 C. C. A. 135.

Cost of pumping compelled by Court to aid inspection, allowed to defendant in suit on injunction bond.—*Tyler Co. v. Last Chance Co.*, 90 F. 16, 32 C. C. A. 498, 19 M. R. 525.

Inspection should be allowed to keep pace with development; and it may be allowed through opposing parties' shaft.—*State v. District Court*, 29 Mont. 105, 74 P. 132. Defendants to prove that their discovery was on a vein formation gave evidence of the formation and conditions at the Hercules Lode, a vein in the same locality in their exclusive possession, but refused permission to plaintiff to inspect the Hercules. The case was reversed for such manifest unfairness at the trial.—*Ambergris M. Co. v. Day*, 12 Ida. 108, 85 P. 109.

The inspection should be confined to the premises in controversy, except where examination further is shown to be material, and the Court can not exclude evidence as a penalty for refusing to allow an inspection.—*Smuggler Union Co. v. Kent*, 47 Colo. 320, 112 P. 223.

In California a stockholder has the right to examine the mine and to take an expert with him.—*Hobbs v. Davis*, 168 Cal. 556, 143 P. 733. In *Kinard v. Ward* the penalty against officer refusing permission was recovered.—21 Cal. App. 85, 130 P. 1196.

The statutory right to inspect includes the right to take samples for assay.—*Symmes v. Sierra Nevada Co.*, 171 Cal. 427, 153 P. 710.

Inspection may be ordered of gas wells.—*Culbertson v. Iola Co.*, 87 Kan. 529, Ann. Cas. 1914A, 610, 125 P. 81.

Survey Without Suit.

A statute of Montana authorizes a survey by order of Court without institution of suit and it has been held that this is due process of law.—*Montana Co. v. St. Louis Co.*, 152 U. S. 160, 14 Sup. Ct. Rep. 506, 38 L. Ed. 398. But it requires an express statute to allow of any such unusual procedure.—*State v. Dist. Court*, 26 Mont. 396, 68 P. 570. 69 P. 103; *National Co.*

v. Dist. Court, 34 Nev. 67, 116 P. 996. And the Colorado Statute can not be construed to allow it without a supporting suit already begun.—*People v. De France,* 29 Colo. 309, 68 P. 267, 22 M. R. 61. In later cases from Montana, the Court defines the essential limitations and conditions which should be imposed on petitions of this kind.—*State v. District Court,* 28 Mont. 528, 73 P. 230, 30 Mont. 206, 76 P. 206.

It may be allowed when defendant's secret workings are approaching plaintiff's.—*State v. District Court,* 26 Mont. 483, 68 P. 861.

View by Court or Jury.

Under the Colorado Code, Sec. 206, either party may demand that the jury view the mine. The better practice of the Federal Court in the same State is never to permit it. The arguments in favor of a jury view in such cases are plausible, but not enough to offset the inconvenience and often the unfairness of such view. Barring exceptional instances, unless by the compulsion of a statute, it ought never to be allowed. But where such view has been had an Appellate Court may consider it conclusive as to what the jury saw on the ground.—*Ormund v. Granite Mt. Co.,* 11 Mont. 303, 28 P. 289; *McCormick v. Parriott,* 33 Colo. 382, 80 P. 1044; *Ebner Co. v. Alaska Co.,* 210 F. 599, 127 C. C. A. 235; *Esselstyn v. U. S. Corp.,* 59 Colo. 294, 149 P. 93. But see *White v. Barling,* 36 Mont. 413, 93 P. 348.

A party to the suit may be appointed a guide to show the jury the mine.—*Wilson v. Harnette,* 32 Colo. 172, 75 P. 395.

In *Golden v. Murphy,* 27 Nev. 379, 75 P. 625, 76 P. 29, the trial Judge personally inspected the mine along with the jury, and the jury finding for the defendants the Judge granted a new trial. The defendants, very justly as it seems to us, contended that this took the facts from the jury, but the Appellate Court sustained the judgment on other grounds.

In *Wall v. U. S. M. Co.,* 232 F. 613, is stated the effect as evidence of a personal view by the trial Judge, holding that the weight of authority is that it adds evidence instead of being

merely for the better understanding of the testimony. Both in this case and in *Clark Co. v. Butte Co.*, 233 F. 547, 568, there was such a view, and the consideration of both cases shows what little value is to be expected from such practice.

STATUTE OF LIMITATIONS.

Suit to Annul Patent.

Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. * * * —*A. C. March* 3, 1891, *26 Stat. L. 1099, 2 Comp. St. p. 1521.*

The above section was enforced in *Peabody Co. v. Gold Hill Co.*, 106 F. 241, 21 M. R. 151. But held not to apply where the fraud had been concealed.—*U. S. v. Exploration Co.*, 203 F. 387, 121 C. C. A. 491, 225 F. 854, 235 F. 110.

Possessory Title Perfected by Time.

Section 2332 of the United States Statutes expressly recognizes possession of a mining claim during the period fixed by the State Act as sufficient to establish a right thereto.—*420 Mining Co. v. Bullion Co.*, 9 Nev. 240, 1 M. R. 114. And a claim may be sued for under the title so developed.—*Glacier Mt. Co. v. Willis*, 127 U. S. 472, 8 Sup. Ct. Rep. 1214, 32 L. Ed. 172, 17 M. R. 127. Such title by continued possession is equivalent to location.—*Altoona Co. v. Integral Co.*, 114 Cal. 100, 45 P. 1047.

The apparently clear construction of Sec. 2332 is that in *ex parte* cases an applicant for patent may rely on his continued possession without producing abstract of title, and that a party in like position could adverse on the same ground.—29 L. D. 401. And that if an adverse claim was filed, in the suit supporting such adverse either party could rely on such

possession until defeated by the production of some superior title. And such is the import of the above citations. But in Montana and Colorado the section has been construed as a mere permission to support patent applications on possession, in non-contested cases.—*McCowan v. Maclay*, 16 Mont. 234, 40 P. 602; *Cleary v. Skiffich*, 21 M. R. 284, 28 Colo. 362, 89 Am. St. Rep. 207, 65 P. 59.

Bismarck Mtn. Co. v. N. Sunbeam Co., an adverse claim suit, cites the *Skiffich case*, and decides that possession for the statutory period makes good title.—14 Ida. 516, 95 P. 14.

Adverse possession for the statutory period gives title.—*Cox v. Clough*, 70 Cal. 345, 11 P. 732; *Herriman Co. v. Butterfield Co.*, 19 Utah 453, 57 P. 537, 51 L. R. A. 930; *Lavagnino v. Uhlig*, 26 Utah 1, 99 Am. St. Rep. 808, 71 P. 1046, 22 M. R. 610.

Seven years complete the bar of the statute in Colorado (R. S. Secs. 4084-4093), but all taxes must be paid.—*Eberville v. Leadville Co.*, 28 Colo. 241, 64 P. 200. The period varies in every State, in Nevada being as low as two years.—*South End Co. v. Tinney*, 22 Nev. 19, 35 P. 89, 22 Nev. 221, 38 P. 401.

Twenty years' continuous occupation presumes a grant and gives complete title.—*Central Co. v. Penny*, 173 F. 340, 97 C. C. A. 600.

The statute of limitations does not begin to run while the title is in the United States, except as between parties both of whom claim by possessory title only.—*King v. Thomas*, 6 Mont. 409, 12 P. 865; *Weibold v. Davis*, 7 Mont. 107, 14 P. 865. Nor until the patent actually issues.—*South End Co. v. Tinney*, 22 Nev. 221, 38 P. 401; *Clark v. Barnard*, 15 Mont. 176, 38 P. 834.

In the case of *Harris v. Equator Co.*, cited p. 443, it was intimated in the opinion of the Court, that where a party had been in possession of a mining claim for the period of the statute of limitations, such fact raised a presumption, at least against a wrongdoer, that he held under a valid location,

without proof of the various acts of location, and such must from the nature of things be the ultimate decision of all Courts upon this point.—*Cleary v. Skiffich,* 28 Colo. 362, 89 Am. St. Rep. 207, 65 P. 59, 21 M. R. 284.

Mining Proves Possession.

The continuous working of a mine, or even its working during successive seasons with intervening seasons during which the mine is left idle, according to the custom of the country, is as complete an adverse possession as could be gained by agricultural operations or other acts of possession.—*Stephenson v. Wilson,* 37 Wis. 482, 13 M. R. 408; *Wilson v. Henry,* 1 M. R. 152, 35 Wis. 241, 1 M. R. 157, 40 Wis. 594; *420 M. Co. v. Bullion Co.,* Fed. Cas. No. 4989, 11 M. R. 608, 3 Sawy. 634; *Bell v. Denson,* 56 Ala. 444.

Gordon v. Park, 219 Mo. 600, 117 S. W. 1163, is a full case on the issue of adverse possession between the surface owner and the mineral claimant.

Digging prospect holes and desultory work, though continued for the statutory period, is not such possession as the law requires.—*Pacific Co. v. Pioneer Co.,* 205 F. 577, 123 C. C. A. 593.

Elements of Adverse Possession.

To make adverse possession available there must be:

First—The occupation or use of the land.

Second—Claim and color of title.

It has been ruled that a party following a patented vein on its strike beyond its side lines has not sufficient color of title to maintain such defense.—*Lebanon Co. v. Rogers,* 8 Colo. 34, 5 P. 661. And that mining on a vein apexing outside the party's claim is not adverse possession.—*Davis v. Shepherd,* 31 Colo. 141, 72 P. 57, 22 M. R. 575.

Possession under title bond gives claim and color after payment of purchase money.—*Woods v. Montevallo Co.,* 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. 475.

In instances the title may ripen without being initiate on any paper.—*Minnesota Co. v. Brasier*, 18 Mont. 444, 45 P. 632; *Risch v. Wiseman*, 36 Or. 484, 78 Am. St. Rep. 783, 59 P. 1111, 20 M. R. 409.

Possession under an invalid location makes color of title.—*Protective Co. v. Forest City Co.*, 51 Wash. 643, 99 P. 1033.

The possession of the claim must be open and notorious.—*Hamilton v. Southern Nevada Co.*, 15 M. R. 314, 33 F. 562, 13 Sawy. 113. And exclusive and hostile.—*Tyee M. Co. v. Langstedt*, 121 F. 710, 58 C. C. A. 129. Secret underground mining will not start the bar.—*Pierce v. Barney*, 209 Pa. 132, 58 Atl. 152.

In Trespass.

As to actions of trespass for coal or ore taken but the fact not ascertained by plaintiff within the statutory period, see *Lewey v. Frick Co.*, 166 Pa. 536, 45 Am. St. Rep. 684, 28 L. R. A. 283, 31 Atl. 261, 18 M. R. 179; *Williams v. Pomeroy Co.*, 6 M. R. 195, 37 Ohio St. 583; *Bullion Co. v. Eureka Hill Co.*, 36 Utah 329, 103 P. 881.

And as to that class of cases (as in secret undermining) where a long interval may elapse before the resulting injury, see *Hall v. Duke of Norfolk, L. R.* (1900), 2 Ch. 493; *Sterrett v. Northport Co.*, 30 Wash. 164, 70 P. 266; *Noonan v. Pardee*, 21 M. R. 517, 200 Pa. 474, 86 Am. St. Rep. 722, 55 L. R. A. 410, 50 Atl. 255.

In *Lightner Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 P. 771, it was held, construing the Statute of California, that it did not begin until plaintiff had knowledge of the secret underground trespass.

Surface Support Cases.

In Pennsylvania it was held that the statute began to run "when the support of the surface was so weakened that it might fall."—*Tischler v. Penn. C. Co.*, 218 Pa. 82, 66 Atl. 988.

In a surface support case the statute does not begin to run until actual injury has begun to occur.—*West Pratt Co. v. Dorman*, 161 Ala. 389, 135 Am. St. Rep. 127, 18 Ann. Cas. 750, 23 L. R. A. (N. S.) 805, 49 So. 849.

Miscellaneous Cases.

As to the running of the statute where money is to be paid out of the proceeds of the mines, see *Charter Oak Co. v. Stephens*, 5 Utah 319, 15 P. 254.

Where a mine has been flooded by the negligence of an adjoiner, the statute begins to run from the date of the flooding.—*Duff v. U. S. Gypsum Co.*, 189 F. 234.

Apex Rights.

Adverse possession for the legal period gives the claimant all lodes apexing within his lines and the right to follow these on the dip, but whether a lode excluded from a town site patent could claim extralateral rights was not decided.—*Golden v. Murphy*, 31 Nev. 395, 103 P. 394, 105 P. 99.

BUREAU OF MINES.

By R. S. Colo. Secs. 4259-4306, are prescribed the duties of the Bureau of Mines, of the Commissioner of Mines and three inspectors of metalliferous mines, with strict provisions for safeguarding.

They regulate the storage of explosives, escape ways, compartment shafts, signals and ventilators, and forbid the use of iron tamping bars.

They require all serious accidents to be reported and investigated and provide penalties for failure to comply with the provisions of the act.

Other States have like legislation, and a Federal Bureau of Mines was established by A. C. of 1910.—36 St. L. 369, 37 *Id.* 681.

ASSAYS.

Gold, silver and platinum are assayed for the number of ounces per ton of ore; lead, copper, zinc and the base metals generally for the per cent of the minerals in the ore.

An assay is the test of the value of a specimen or quantity of ore by the extraction of the amount of silver, gold or other metal contained in a minute but exact fraction, which amount is supposed to be proportionate to the whole amount found in the quantity from which the fraction was obtained. Supposing the assay to be correct, its importance in determining the quantity of metal in the ore of the mine, or the value of the mine as deduced from its ore product, depends on the size of the lot from which it was obtained, and the manner in which such lot was selected. What are called specimen assays are of no value whatever, further than to show the contents of the identical specimen from which made, but are often used to deceive persons ignorant in such matters.

While the assay shows only the contents of that portion of ore that has been assayed, its importance lies in its acceptance as indicating the contents of other ore, of which the portion assayed was a "sample."

Between buyer and seller ore is usually sampled by the former, under supervision of the latter, if he choose to be present. The sample taken (pulverized) is divided into portions—one for the buyer, one for the seller, and one to be kept for reference in case of difference between the other two. After division, each portion is in itself a sample. Both buyer and seller have a control assay (assay in duplicate) made of their respective samples. The sale is customarily made on the assay of the buyer, and the sample of the seller is intended for a check on the assay of the buyer.

The results of carefully made assays should not differ more than two ounces silver or two-tenths ounce gold except where the ore contains much free gold, native silver or silver glance, the particles of which can not be reduced to exact evenness,

and make assays of these classes of ore treacherous. In case of disagreement, the third portion of the original sample, called the umpire, is tested by a third party for a control, and this assay is final unless there be such unusual and excessive variation as to suggest the necessity of resampling.

The fire assay shades slightly in favor of the buyer, but all processes pretending to secure substantially more gold than that shown by the fire assay are frauds.

The intent of an assay is to show the true value of the ore, and if it is so taken as not to show such value, proof of assays otherwise taken may be given in evidence.—*Phipps v. Hully,* 18 Nev. 133, 15 M. R. 350, 1 P. 669. Difference in results of wet and fire assays.—*In re Puget Co.,* 96 F. 90.

Sales based on assay are not bound by the assay in case of gross error.—*Cox v. Prentice,* 3 M. & S. 344. As to the custom of assayers, and of which party, if of either, he is the agent, see this case and *Trotter v. Heckscher,* 40 N. J. Eq. 612, 4 Atl. 83, 42 N. J. Eq. 251, 7 Atl. 353. As to deductions for moisture, see this litigation continued in *Lehigh Co. v. Trotter,* 42 N. J. Eq. 661, 9 Atl. 694. Sufficient proof by assay that samples were salted with powdered silver.—*Mudsill Co. v. Watrous,* 61 F. 163, 9 C. C. A. 415, 18 M. R. 1. By assay with litharge, a trace of silver may be shown in any kind of rock.—*Ormund v. Granite Mt. Co.,* 11 Mont. 303, 28 P. 289. An assay of two lots is no proof of the value of a series of shipments.—*Pittsburg Co. v. Glick,* 7 Colo. App. 43, 42 P. 188. Method of sampling and assay on ore sales described.—*Chisholm v. Eagle Ore Co.,* 144 F. 670, 75 C. C. A. 472.

A purchaser of phosphate rock is entitled to deductions for its falling below agreed assay, and is not bound to accept at all if materially short.—*Stono Mines v. Southern Co.,* 76 S. C. 327, 56 S. E. 982.

Mill samples control car samples.—*Vietti v. Nesbitt,* 22 Nev. 390, 41 P. 151, 18 M. R. 247; *Fox v. Hale Co.,* 108 Cal. 369, 41 P. 308. The "assay value" of gold means its universal standard value and not the value of local gold bullion.—*Id.*

But a contract to pay 95 per cent of the silver contents of the "product of said ore" does not mean 95 per cent of the assay value of the raw ore.—*Silver Co. v. N. C. Sm. Co.*, 122 N. C. 542, 29 S. E. 940, 19 M. R. 339.

An assay is material proof on an issue as to whether certain rock is mineral bearing.—*Healey v. Rupp*, 28 Colo. 102, 63 P. 319, 21 M. R. 117.

In *Richardson v. National Reduction Co.* the Supreme Court of Nevada say they will take judicial notice of the fact that amalgamating and cyaniding will not effect an extraction of 100 per cent of the fire assay of the metallic content. But it is a well known fact that the smelters will extract full 100 per cent of the fire assay of certain gold ores.

Proof of Assay.

An assay certificate does not prove itself; nor can it be proved by one of the assaying firm who had no personal knowledge of the assay.—*People v. Whalen*, 154 Cal. 472, 98 P. 194. But in *Carter v. Bell*, LEWIS, J., in the U. S. Circuit Court, Denver, ruled that where ore had been paid for on the strength of an ore buyer's assay, the assay proved itself, and the assayer need not be called.

SCHOOL OF MINES.

The General Assembly may provide that the science of mining and metallurgy be taught in one or more of the institutions of learning under the patronage of the State.—Colo. Const., Art. 16, Sec. 4.

Under the above provision the "School of Mines" at *Golden* is especially incorporated, and is supported by the State.

Its declared object is to furnish "such instruction as is provided for in like technical schools of a high grade," and it is authorized to confer degrees.

The course includes four years of two terms each. These are divided, after the second year, into mining and metallurgical engineering.

Similar State schools are established at *Rolla,* Missouri; *Houghton,* Michigan; *Rapid City,* South Dakota; *Butte,* Montana; *Moscow,* Idaho; *Virginia City,* Nevada; *Blake,* Utah, and *Socorro,* New Mexico.

The Universities of Arizona, California, Nevada, North Dakota and Wyoming have special departments covering the same ground.

LAND OFFICE REGULATIONS.

Re-Issued by the General Land Office, August 6, 1915.*

NATURE AND EXTENT OF MINING CLAIMS.

1. **Two Classes of Claims.**—Mining claims are of two distinct classes: Lode claims and placers.

LODE CLAIMS.

2. **The status of lode claims** located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. **Possessory Right Prior to May 10, 1872.**—It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872,* and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

*These rules have been repeatedly reissued and alterations made in and additions to particular rules, but their numbers have not been changed since the issue of 1901. They are printed in full in 44 L. D. 285. For rules of practice in contest cases see 44 L. D. 395.

4. **Who May Locate.**—From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. **Width—Surface Ground.**—With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. **Size of Claim.**—By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. **Location Certificate.**—Locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by refer-

ence to some natural object or permanent monument, as will identify the claim.

8. **No lode claim shall be located until after the discovery** of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

9. **Discovery—Ties—Description.**—The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

10. **Adjoining Claims — Staking—Location—Notice.**—In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery, it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

11. **The location notice must be filed for record** in all respects as required by the State or Territorial laws and local rules and regulations, if there be any.

12. **Annual Labor.**—In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that

ten dollars shall be expended annually in labor or improvements for each *one hundred feet* in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually. Under the provisions of the Act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Where a number of contiguous claims are held in common, the aggregate expenditure that would be necessary to hold all the claims may be made upon any one claim. Cornering locations are held not to be contiguous.

13. **Same—Failure to Perform.**—Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

14. **Same—Not Required After Entry.**—Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

15. **Forfeiture to Co-Owner.**—Upon the failure of any one of several co-owners to contribute his proportion of the required expenditures, the co-owners, who have performed the labor or made the improvements as required, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates, and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

TUNNELS.

16. **The effect of section 2323, Revised Statutes,** is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel,

and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. **Tunnel Notice—Staking.**—To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. **Record of Tunnel.**—A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

PLACER CLAIMS.*

19. **But one discovery of mineral is required** to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

20. **Building Stone—School Lands.**—The Act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any State are not subject to entry under said act.

21. **Petroleum—Oils.**—The Act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

22. **Same—Field Examinations.**—Upon the presentation of every case within the purview of the Act of March 2, 1911 (36 Stat. L., 1015), the local officers must advise the chiefs of field division, in order that the latter may make such field examinations as are advisable or necessary, particularly if the land involved has been embraced in a withdrawal, as to the time when the development work was begun, and be prepared to submit the results, if possible, before entry is allowed. Each such case will be considered and adjudicated upon its record in the regular manner.

Observing that the operation of the act is retrospective only, being confined to locations made prior to the date thereof, you will, upon the presentation of any application for patent affected by the provisions of said act, immediately communicate to the proper chief of field division due and full information thereof, to the end that he may procure to be made such investigations as may be necessary to ascertain the facts concerning the inception and subsequent prosecution of development operations, the extent and character of such works, and any other facts bearing upon and affecting the validity of the claim, including the continuousness and diligence with which development proceeded from the date of inception.

Report made of the results of such examinations will be submitted to this office, upon receipt of which the local officers will be advised as to the action to be taken. (Instructions, May 17, 1911, approved, July 11, 1912.)

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*See, also, Regulations 58-60.

23. **Ten-Acre Tracts.**—By Sec. 2330 authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.

24. **Description—Improvements.**—A ten-acre subdivision may be described, for instance if situated in the extreme northeast of the section, as the "NE. ¼ of the NE. ¼ of the NE. ¼" of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

25. **The proof of improvements** must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of $100, required by Sec. 2324, Revised Statutes, must be made upon placer as well as lode locations.

26. **Lode in Placer.**—Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. An application which omits to claim such known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

27. **Size of Claim.**—By Sec. 2330 it is declared that no location of a placer claim made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

28. **Conform to Public Survey.**—Sec. 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys

and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

29. **Location by an Association.**—The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

30. **How Located.**—The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer-mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

Conformity to the public land surveys and the rectangular subdivisions thereof will not be required where compliance with such requirement would necessitate the placing of the lines thereof upon other prior located claims or where the claim is surrounded by prior locations.

Where a placer location by one or two persons can be entirely included within a square forty-acre tract, by three or four persons within two square forty-acre tracts placed end to end, by five or six persons within three square forty-acre tracts, and by seven or eight persons within four square forty-acre tracts, such locations will be regarded as within the requirements where strict conformity is impracticable.

Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case, and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the government to have all entries whether of agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. *(Snow Flake Fraction Placer,* 37 L. D. 250.)

REGULATIONS UNDER SALINE ACT.

31. **Only One Location to Same Person.**—Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer-mining claims are extended to all States and the Territory of Alaska, so as to permit the location and

purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

32. **Rights Assignable.**—Rights obtained by location under the placer-mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name: *Provided,* He has not held under this act, at any time, either as locator or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

33. **Affidavit to Location Certificate.**—In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the application for patent must contain or be accompanied by a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. The application for patent should also be accompanied by a showing under oath, fully disclosing the qualifications as defined by the proviso, of the applicants' predecessors in interest. (As amended June 4, 1912.)

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

LODE CLAIMS.

34. **Official Survey.**—The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor general; one plat and the original field notes to be retained in the office of the surveyor general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the United States surveyor general.

The surveyor general will prepare the original plat on Form 4-675. All lines clear and sharp in black. All letters and figures clear and sharp in black.

The original plat, so prepared, will be signed and dated by the surveyor general and forwarded to the General Land Office flat or in tube and unmounted.

As to plats of survey of mining claims outside of the Territory of Alaska, the Commissioner will have three photolithographic copies made upon drawing paper, which copies, with the original plat, will be forwarded to the surveyor general, the duplicate, triplicate, and quadruplicate to be signed by him, and the four plats to be filed and disposed of in the same manner as provided in paragraph 34 of the Mining Regulations, viz.: One plat and the original field notes to be retained in the office of the surveyor general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district, to be retained on his files for future reference.

As to plats of survey of mining claims in the Territory of Alaska, the Commissioner will have three photolithographic copies made upon drawing paper, two copies of which, with the original plat, will be forwarded to the surveyor general, the duplicate and triplicate to be signed by him, and the three plats to be filed and disposed of as follows: One plat and the original field notes to be retained in the office of the surveyor general; one plat and a copy of the field notes to be given the claimant, for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district to be retained in his files for future reference. The Commissioner will mail one photolithographic copy of the plat, made upon drawing paper, direct to the applicant for survey, or to his agent or attorney, when the application is made by agent or attorney, at his record address, to be used for posting on the land.

A certain number of photolithographic copies will be furnished the surveyor general for sale at a cost of 30 cents each, and a photolithographic copy printed on tracing paper will be furnished the surveyor general, from which blue prints may be made, to be sold at cost. (Instructions, July 29, 1911, as amended October 8, 1912.)

35. **Same—None Before Record.**—The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the State or Territory or the regulations of the mining district require the notice of location to be recorded).

and when the original location is made by survey of a United States mineral surveyor such location survey can not be substituted for that required by the statute, as above indicated.

36. **Numbering Surveys—Ties to Government Corners.**—The surveyors general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the *locus* of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length, and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the mineral surveyor at the time of his making the particular survey and be made a part thereof.

37. (*a*) **Report to Land Office.**—Promptly upon the approval of a mineral survey the surveyor general will advise both this office and the appropriate local land office, by letter (Form 4-286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral surveyor who made the survey; and will also briefly describe therein the *locus* of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

Agricultural Fractions.

(*b*) Upon application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already reallotted in accordance therewith, the local officers will

accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet relotted accordingly, the local officers will promptly advise this office thereof; and will also report and identify any pending application for mineral patent affecting such subdivision which the agricultural applicant does not desire to contest. The surveyor general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated, and directed to prepare at once, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-acre subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(*c*) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applications to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and receiver for submission to the Commissioner of the General Land Office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated *as mineral* are in fact mineral in character; otherwise, in the absence of satisfactory showing in any such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

38. **The following particulars should be observed** in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from

the point of discovery or other well-defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim	10.50
Area in conflict with survey No. 302	1.56
Area in conflict with survey No. 948	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

39. **Posting Plat.**—The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat survey. Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

Same, in Alaska.

(*a*) The notices of applications for patent for lands in Alaska are, in many cases, not sufficient to apprise adverse claimants and the public generally of the location of the land applied for, and therefore do not serve the purpose for which such notices are required; nor can the location of the land be ascertained from the application papers themselves and without obtaining information from other sources. This is due principally to the large area of unsurveyed land in the district and remoteness from centers of population of much of the country. In order to give a more definite description of the land applied for the following special instructions with reference to the Territory of Alaska are issued,

which are supplemental to but do not change or modify existing regulations:

Field Notes and Ties in Alaska.

(*b*) The field notes of survey of all claims within the Territory of Alaska, where the survey is not tied to a corner of the public survey, shall contain a description of the location or mineral monument to which the survey is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska, which description shall appear in the field notes regardless of whether or not the survey be tied to an existing monument, or to a monument established by the surveyor when making the survey in accordance with existing regulations with reference to the establishment of such monuments. The description of such monument shall appear in a paragraph separate from the description of the courses and distances of the survey.

(*c*) All notices of applications for patent for lands in the Territory of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the exact location of such claim without an examination of the record or a reference to other sources. The registers and receivers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application. (Instructions, December 23, 1913.)

40. **Proof of Posting.**—After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

41. **Application for Patent.**—Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a com-

pliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession and the basis of his claim to a patent. The application should contain a full description of the kind and character of the vein or lode and should state whether ore has been extracted therefrom, and, if so, in what amount and of what value. It should also show the precise place within the limits of each of the locations embraced in the application where the vein or lode has been exposed or discovered and the width thereof. The showing in these regards should contain sufficient data to enable representatives of the Government to confirm the same by examination in the field and also enable the land department to determine whether a valuable deposit of mineral actually exists within the limits of each of the locations embraced in the application.

Applications in Alaska.

(*a*) The register and receiver will require each person applying to enter or in any manner acquire title to any of the lands in Alaska, under any law of the United States, to file a corroborated affidavit to the effect that none of the lands covered by his application are embraced in any pending application for an allotment under the act of May 17, 1906 (34 Stat. 197), or in any pending allotment; that no part of said land was at the date of the location of the land claimed under the mining law occupied or claimed by any Indian, whose occupancy or claim existed on the date of the acts granting to natives of Alaska the right to hold land used, occupied, or claimed by them (Acts of Congress of May 17, 1884, 23 Stat. 24, and June 6, 1900, 31 Stat. 330), and had been continued down to and including date of location; that such land is in the *bona fide* legal possession of the applicant; and that no part of such land is in the *bona fide* legal possession of or is occupied by any Indian or native. (37 L. D. 616, and 43 L. D. 88, 272.)

42. **Abstract of Title.**—This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim certified by the legal custodian of the records of transfers, or by a duly authorized abstracter of titles. The certificate must state that no conveyances affecting, or purporting to affect, the title to the claim or claims appear of record other than those set forth.

Outside of the Territory of Alaska, the application for patent will be received and filed if the abstract is brought down to a day reasonably near the date of the presentation of the application and shows full title in the applicant, who must as soon as practicable thereafter file a supple-

mental abstract brought down so as to include the date of the filing of the application. Publication will not be ordered until the showing as to title is thus completed and the local land officers are satisfied that full title was in the applicant on the day of the filing of the application.

Alaska Abstracts of Title.

In the Territory of Alaska the application for patent will be received and filed and the order for publication issued if the abstract showing full title in the applicant is brought down to a day reasonably near the date of the presentation of the application. A supplemental abstract of title brought down so as to include the date of the filing of the application must be furnished prior to the expiration of the 60-day period of publication.

No certificate from an abstracter or abstract company will be accepted until approval by the Commissioner of the General Land Office of a favorable report of the chief of field division, or United States district attorney whose division or district embraces the lands in question, as to the reliability and responsibility of such abstracter or company. (As amended January 9, 1912.)

43. **Lost Records.**—In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

44. **Two Applications for Same Land—Railroad Lands.**—Before approving for publication any notice of an application for mineral patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any land embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that notice of a mineral application should not, for this or other reasons, be approved for publication, they should formally reject the same, giving the reasons therefor, and allow the applicant 30 days for appeal to this office under the Rules of Practice. (As amended August 9, 1911.)

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of *every* such

application embracing *any* portion of unsurveyed lands within such limits (except as to any such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the Act of February 26, 1895, without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company will be disposed of as provided by the first section of this paragraph, and the applicant afforded opportunity to protest and apply for a hearing or to appeal.

Notice should be given to the duly authorized representative of the railroad grantee, in accordance with the Rules of Practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad.

Evidence of service of notice should be filed with the record in each case.

45. **Publication — Publisher's Agreement.** — Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. **Data in Notices.**—The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the *locus* of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances. (See also par. 39 (*a*), (*b*), (*c*).)

47. **Register Designates Newspaper.**—The register shall publish the notice of application for patent in a paper of established

character and general circulation, to be by him designated as being the newspaper published nearest the land.

48. **Surveyor General's Certificate of $500 Improvements.**—The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register a certificate of the surveyor general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several contiguous locations held in common, that an amount equal to five hundred dollars for each location has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated in a patent, serve to identify the premises fully, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof: *Provided*, That as to all applications for patents made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient, and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

49. **Same—Source of Information.**—The surveyor general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who actually makes survey and examination of the premises, in so far as such matters rest in the personal knowledge of the mineral surveyor. The mineral surveyor should specify with particularity and full detail the character and extent of such improvements. As to when and by whom the improvements were made and other essential matters not within such mineral surveyor's personal knowledge, recourse may be had by the surveyor general to corroborated affidavits by persons possessing such personal knowledge, or the best evidence in this behalf otherwise obtainable. This showing should accompany the report of the mineral surveyor as to improvements. (As amended April 9, 1915.)

50. **Certificate on Plat and Field Notes.**—It will be convenient to have this certificate indorsed by the surveyor general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

51. **Proof of Publication and of Plat Remaining Posted.**—After the sixty days' period of newspaper publication has expired, the

claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

52. **Entry Price—Proof of Sums Paid.**—Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, and no other objection appears, permit the claimant to pay for the land to which he is entitled at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

53. **Protest.**—At any time prior to the issuance of patent protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the Court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a co-owner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. (See *Turner v. Sawyer*, 150 U. S. 578-586, 14 Sup. Ct. 192, 37 L. Ed. 1189, 17 M. R. 683.)

54. **Application by Trustee.**—Any party applying for patent as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

55. **Annual Labor Solely a Question Between Adverse Claimants.**—The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of

the Revised Statutes, is, with the exception of certain phosphate placer locations, validated by the Act of January 11, 1915 (see regulations thereunder, dated March 31, 1915, in Addenda, p. 92), solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.

56. **Failure to Prosecute Application Diligently.**—The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

57. **Same—Prosecution Delayed by Adverse.**—The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

PLACER CLAIMS.*

58. **On Surveyed Lands.**—The proceedings to obtain patents for placer claims, including all forms of mineral deposits excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required. Where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

59. **Price.**—The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; the price of placer claims being fixed, however, at two dollars and fifty cents per acre or fractional part of an acre.

60. **Statements in Application for Patent.**—In placer applications, in addition to the recitals necessary in and to both vein or

*See, also, Regulations 19-30.

lode and placer applications, the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation and that title is sought not to control water courses or to obtain valuable timber but in good faith because of the mineral therein. This statement, of course, must depend upon the character of the deposit and the natural features of the ground, but the following details should be covered as fully as possible: If the claim be for a deposit of placer gold, there must be stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold. If it be a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim. He will also be required to describe fully the natural features of the claim; streams, if any, must be fully described as to their course, amount of water carried, fall within the claim; and he must state kind and amount of timber and other vegetation thereon and adaptability to mining or other uses.

If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

While these data are required as a part of the mineral surveyor's report under paragraph 167, in case of placers taken by special survey, it is proper that the application for patent incorporate these facts under the oath of the claimant.

Inasmuch as in case of claims taken by legal subdivisions, no report by a mineral surveyor is required, the claimant, in his application in addition to the data above required, should describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the course and distance thereof to the nearest corner of the public surveys.

As prescribed by paragraph 25, this statement as to the description and value of the improvements must be corroborated by the affidavits of two disinterested witnesses.

Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to proof as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

Local land officers are instructed that if the proofs submitted in placer applications under this paragraph are not satisfactory as showing the land as a whole to be placer in character, or if the claims impinge upon or embrace water courses or bodies of water, and thus raise a doubt as to the *bona fides* of the location and application, or the character and extent of the deposit claimed thereunder, to call for further evidence, or if deemed necessary, request the specific attention of the Chief of Field Service thereto in connection with the usual notification to him under the circular instructions of April 24, 1907,* and suspend further action on the application until a report thereon is received from the field officer.

Placer Claims in Alaska.—Attention is directed to the Act of Congress approved August 1, 1912 (37 Stat. L. 242), entitled "An act to modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes." In administering this act the foregoing regulations should be followed in so far as they are applicable, and these additional instructions of October 29, 1912, are prescribed:

It is important to note that this act applies exclusively to placer mining claims located in Alaska on or after August 1, 1912. It does not in any manner relate to lode mining claims, or to placer mining claims located prior to said date. The terms of the act lay strict limitations and conditions with respect to placer locations made upon or after said date.

Section 1 of the act provides that no association placer claim shall be located after August 1, 1912, in excess of 40 acres. This limitation is positive whatever may be the number of persons associated together or whatever the local district rules or regulations may permit.

Said section further provides that on every placer mining claim located in Alaska after the passage of the act, and until patent therefor has been issued, not less than $100 worth of labor must be performed or improvements made during each year, including the year of location, for each and every 20 acres or excess fraction thereof included in the claim. This means that the *first* annual expenditure on such a placer mining location must be accomplished for and during the calendar year in which the claim is located, instead of during the calendar year succeeding that in which the location is made. Moreover, the amount of annual expenditure is dependent upon the size of the claim, it being required that at least $100 must be expended for each 20 acres, or excess fraction thereof, embraced in the location.

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*Rule 7 of this circular amended October 30, 1913. (See 42 L. D. 474.)

By section 2 it is provided that no person, as attorney or agent for another, may locate any placer mining claim unless duly authorized by a power of attorney properly acknowledged and recorded in some recorder's office within the judicial division where the location is made. Furthermore, an authorized agent or attorney can act in making locations of placer mining claims for only two individual principals or one associate principal during any calendar month and during that period may not lawfully locate more than two claims for any one principal either individual or association. No placer claim can lawfully be located except in compliance with and under the limitations of the act.

In order that the land department may be fully advised in the premises, the following requirements must be met with regard to applications for placer mining claims located in Alaska on or after August 1, 1912:

(*a*) Where location is made by agent or attorney the power of attorney must be in writing and must be executed and acknowledged in accordance with the laws of the Territory of Alaska or of the State, Territory, or District in which it shall be executed. It must be recorded in the proper recorder's office, as prescribed by the act. The application for patent must be accompanied by a certified copy of such power of attorney which must show the recordation thereof; but it will be sufficient if such certified copy is attached to and made a part of the abstract of title.

(*b*) One of the principal purposes of the act is to limit the number of placer mining locations made in Alaska through agents or attorneys. An agent or attorney can not at one time represent more than *two individuals* or *one association* under powers of attorney. A duly authorized agent may make two locations for each of two individual principals, or for one association principal, during any calendar month, but he can make no further locations during that month for those or other principals.

The application for patent should accordingly be accompanied by the sworn statement of the agent or attorney setting forth specifically the names of all placer mining claims, together with the date of location and names of the locators, which were located or attempted to be located by him under powers of attorney during the calendar month in which the placer claim applied for was located.

(*c*) By section 3 it is prescribed that no person shall directly locate, or through an agent or attorney cause or procure to be located, for himself more than two placer mining claims in any calendar month: *Provided, however,* That one or both of such locations may be included in an association claim.

Whenever a person or an association has participated in the locating of placer mining claims in Alaska to the extent of two such claims in any calendar month, such person or such association thereby exhausts the

right to make placer location for that month. The application for patent, therefore, for a placer mining claim located in Alaska on or after August 1, 1912, must contain or be accompanied by a specific statement, under oath, as to each locator who had an interest therein, showing specifically and in detail all placer locations made by him, or in which he was associated, either directly or through any agent or attorney, during the calendar month in which the claim applied for was located. If no locations in excess of those permitted by law were made during such calendar month a specific statement, under oath, to that effect, should be submitted. This showing must be made in addition to that hereinabove required of the agent himself.

Section 4 of the act prohibits the patenting of any placer mining claim located in Alaska after the passage of the act, which contains a greater area than that fixed by law or which is longer than three times its greatest width. The surveyor general will be careful to observe the above requirements and will not approve any survey of a placer location which does not in area and dimensions conform to the provisions of law.

By section 5 of the act it is declared that any placer mining claim attempted to be located in violation of the provisions and limitations of the act shall be null and void and the whole area covered by such attempted location may be located by any qualified person the same as if no such prior attempted location had been made. Consequently, any attempted placer location not made in conformity with the act is a nullity and the land covered thereby is open for and subject to proper location at any time.

It will be observed that the act does not affect the number of claims, lode or placer, and if placer whether located before or after the passage of the act, which may be included in a single application proceeding.

MILL SITES.

61. Land entered as a mill site must be shown to be non-mineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

62. Non-Contiguous — Independent Application. — To avail themselves of this provision of law, parties holding the possessory right to a vein or lode claim, and to a piece of non-mineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to

the vein or lode claim, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

63. **Sur. Nos. "A" and "B."**—Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode claim for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

64. **Mill Site Without Lode.**—In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode claim the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

65. **Proof of Non-Mineral Character.**—In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

CITIZENSHIP.

66. **Proof—How Made.**—The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

67. **In case of an individual or an association** of individuals who do not appear by their duly authorized agent, the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence, will be required.

68. **In case an applicant has declared his intention** to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

69. **Affidavit—Where Made.**—The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land districts; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

70. **Proof by Disinterested Witnesses.**—If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

71. **Patent Issues to Applicant.**—No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

72. **Mineral Entries Numbered.**—The mineral entries will be given the current serial numbers according to the provisions of the circular of June 10, 1908, whether the same are of lode or placer claims or of mill sites.

73. **Register's Certificate of Posting.**—In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The schedule of papers, form 4-252f, should accompany the returns with all mineral applications and entries allowed.

POSSESSORY RIGHT.

74. **Chain of Title Broken but Possession Clear.**—The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years

since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. **Proof in Such Case.**—When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim.

76. **Proof of No Litigation.**—There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court, affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid other than that which has been finally decided in favor of the claimant.

77. **Corroborative Testimony.**—The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

78. **An adverse claim must be filed** with the register and receiver of the land office where the application for patent is filed or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

79. **Verification by Agent.**—Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

80. **Same—In Land District.**—The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

81. **Must Show Conflict.**—The adverse claim so filed must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator. If the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

82. **Plat of Conflict—Legal Subdivisions.**—In order that the *"boundaries"* and *"extent"* of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: *Provided, however,* That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.

83. **Notice of Filing Adverse.**—Upon the foregoing being filed within the sixty days' period of publication, the register, or in his absence the receiver, will immediately give notice in writing to *the parties* that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived and the application for patent be allowed to proceed upon its merits.

84. **Adverse Stays Proceedings.**—When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications

issued thereon; and thereafter all proceedings on the application for patent will be stayed with the exception of the completion of the publication and posting of notices and plat and the filing of the necessary proof thereof, until the controversy shall have been finally adjudicated in court or the adverse claim waived or withdrawn.

Adverse Claims in Alaska.—(*a*) The Act of Congress approved June 7, 1910 (36 Stat. L. 459), relates to the filing of adverse claims and the institution of suits thereon, with respect to mineral applications in the Territory of Alaska.

In administering this act the foregoing regulations should be followed in so far as they are applicable, and these additional instructions are prescribed.

Extension of Time for Filing Adverse Claims.

The act provides that adverse claims may be filed at any time during the 60-day period of publication or within 8 months thereafter. This provision applies to any application where the 60-day period of publication ended with, or ends after, June 7, 1910, and operates to enlarge by 8 months additional the time within which an adverse claim may be filed. This provision does not apply to any application under which the 60-day period of publication ended with, or before, June 6, 1910, for, if no adverse claim was seasonably filed in such case, the statutory assumption that none existed has arisen, upon the expiration of the publication period, in favor of the applicant.

Extension of Time Within Which Adverse Suits May Be Instituted.

(*b*) It is also provided by the act that adverse suits may be instituted at any time within 60 days after the filing of adverse claims in the local land office. This provision applies to any adverse claim under which the 30-day period fixed under the former law for commencing the adverse suit was running on, or expired with, June 7, 1910, and enlarges such time to a period of 60 days, and also to any adverse claim which is seasonably filed on, or after, June 7, 1910. Such provision has no operation in a case where, under the former law, the 30-day period within which to institute suit on an adverse claim expired with, or ended before, June 6, 1910, and the 60-day publication period also expired on or before June 6, 1910.

Registers and receivers of United States land offices in Alaska will exercise the greatest care in applying the provisions of the act, and will allow no mineral entry until after the expiration of the full period granted for the filing of adverse claims. For example, on any applica-

tion under which the publication period ended with, or after, June 7, 1910, no entry will in any event be allowed until after the expiration of the eight-months period following the publication period. (Instructions, June 25, 1910.)

85. **Copy of Judgment Roll.**—Where an adverse claim has been filed and suit thereon commenced within the statutory period and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll, together with the other evidence required by section 2326 Revised Statutes, and a certificate of the clerk of the court under the seal of the court showing, in accord with the record facts of the case, that the judgment mentioned and described in the judgment roll aforesaid is a final judgment; that the time for appeal therefrom has, under the law, expired, and that no such appeal has been filed, or that the defeated party has waived his right to appeal. Other evidence showing such waiver or an abandonment of the litigation may be filed. (As amended April 9, 1915.)

86. **Dismissal of Adverse Suit.**—Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

87. **Relinquishment After Adverse.**—After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

88. **Certificate of No Suit Brought.**—Where an adverse claim has been filed but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the District Court of the United States for the district in which the claim is situated, will be required. (As amended November 6, 1912.)

APPOINTMENT OF SURVEYORS FOR SURVEY OF MINING CLAIMS AND CHARGES.

89. **Newspaper Charges.**—Section 2334 provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications in mining cases. Under this authority of law, the following rates have been established as the maximum charges for newspaper publications:

Newspaper Charges in Alaska.

(1) The charge for the publication of notice of application for patent in a mining case, in all districts, exclusive of Fairbanks, Alaska, shall not exceed the legal rates allowed by the laws of the State, wherein the notice is published, for the publication of legal notices, and in no case shall the charge exceed $7 for each 10 lines of space occupied where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication $5 shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

For such publications in the Fairbanks district the maximum rate is fixed at $10 for each 10 lines of space in a daily newspaper for the required period, and at $7 for the same space and time if publication be had in a weekly newspaper.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates are established upon the understanding that they are to be in the usual body type used for legal notices.

(2) For the publication of citations in contests or hearings, involving the character of lands, the charges may not exceed the rates provided for similar notices by the law of the State, and shall not exceed $8 for 5 publications in a weekly newspaper, or $10 for publication in a daily newspaper for 30 days. (As amended June 23-July 1, 1913, and November 28, 1913.)

90. **Appointment of Mineral Surveyors—Bond.**—The surveyors general of the several districts will, in pursuance of said law, appoint in each land district as many competent surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States mineral surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into a bond of not less than $5000 for the faithful performance of his duties.

91. **Surveyor General's Fees.**—With regard to the platting of the claim and other office work in the surveyor general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "deposits by individuals for surveying public lands," and file with the surveyor general duplicate certificates of such deposit in the usual manner.

92. **Surveyors for Each District.**—The surveyors general will endeavor to appoint surveyors to survey mining claims so that one or more may be located in each mining district for the greater convenience of miners.

93. **Oaths of Surveyors.**—The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors general and local land officers are expected to report any infringement of this regulation to this office.

94. **Excessive Charges.**—Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

FEES OF REGISTERS AND RECEIVERS.

95. **Fees for Applications and Adverses.**—The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., par. 9.)

[Paragraphs 96, 97, and 98 are superseded by the general circular instructions of May 4, 1912, prescribing the method of keeping records and accounts relating to the public lands.]

HEARINGS TO DETERMINE CHARACTER OF LANDS.

99. **The Rules of Practice** in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of lands.

100. **Mineral Land Withheld from Agricultural Entry.**—Public land returned by the Surveyor General as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in the manner hereinafter described.

101. **Hearings to determine the character of lands:**

(1) Lands returned as mineral by the Surveyor General.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper non-mineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

[Paragraphs 102 to 104, inclusive, are superseded by appropriate instructions relative to non-mineral proofs in railroad, State, and forest lieu selections contained in separate circulars. (See, as to railroad selections, Instructions in 43 L. D., 476; as to State selections, circular in 39 L. D., 39; and as to forest lieu selections, 31 L. D., 372, 33 L. D., 558, 36 L. D., 278, 346, and 38 L. D., 287.)]

105. **Examination of Witnesses.**—At hearings to determine the character of lands the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what par-

ticular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all. In every case, where practicable, an adequate quantity or number of representative samples of the alleged mineral-bearing matter or material should be offered in evidence, with proper identification, to be considered in connection with the record, with which they will be transmitted upon each appeal that may be taken. Testimony may be submitted as to the geological formation and development of mineral on adjoining or adjacent lands and their relevancy.

106. **Agricultural Capacities of Land.**—The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

107. **Testimony as to Mineral Character.**—The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of minerals were first known to exist on the lands.

108. **Segregating Mineral from Agricultural Land.**—When the case comes before this office, such decision will be made as the law and the facts may justify. In cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party, *at his own expense*, will be required to have the work done by a reliable and competent surveyor to be designated by the Surveyor General. Application therefor must be made to the Register and Receiver, accompanied by description of the land to be segregated and the evidence of service upon the opposite party of notice of his intention to have such segregation made. The Register and Receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, Revised Statutes, as to length and width and parallel end lines.

(a) In order to secure uniformity of practice in the execution of mineral segregation surveys authorized under paragraph 108 *et seq.* of these regulations and to present a proper basis for intelligent action, the following directions are given. They will supersede all previous instructions with which they are in conflict, and will be adopted without refer-

ence to precedent or practice formerly permitted by the General Land Office or the Department.

(b) There appears to exist a very general, although erroneous, assumption that, because the surveys in question relate to the segregation of mineral land, are authorized by the mining regulations, and are usually executed by United States mineral surveyors, they therefore partake of the nature of mineral surveys. That this is not the case will be evident upon consideration of the fact that the necessity for mineral segregation surveys arises almost exclusively with reference to "lands returned as agricultural and alleged to be mineral in character" *(ante,* par. 101, Sec. 2), where the survey, made at the instance, for the benefit, and at the expense of the homestead entryman, is designed solely to define the boundaries of, and provide a legal description for, the *agricultural* land for which application is made. The circumstances that such surveys are usually executed by United States mineral surveyors is without significance, as the regulations provide only that the work shall be done by "a reliable and competent surveyor to be designated by the Surveyor General." This would include county or other surveyors in private practice.

(c) Authority for the survey having issued, and a surveyor having been designated by the Surveyor General, the instructions addressed to the surveyor will particularly emphasize the fact that the survey is nonmineral in character, and as an aid to the preparation of such instructions the Surveyor General's attention is directed to the following considerations:

(d) To all intents and purposes the segregation survey is *ex parte* procedure and confers no permanent rights or benefits upon the mineral claimant. The definition, in whole or in part, of the boundaries of the mining claim is merely incidental to the determination of the confines of the agricultural entry, and the survey, which may involve the retracement and re-establishment of the public-land lines and the subdivision of the section, is effective upon the mineral claim only as a location survey, permitting greater accuracy of description than is usually attained by the somewhat crude methods of the locator.

(e) While a discussion in detail of the field procedure attendant upon the execution of mineral segregation surveys is beyond the purpose of these regulations, and is a subject properly to be determined by the Surveyor General, after consideration of the conditions surrounding the individual case, the *extent* of the required operations is a question of such importance, as affecting not only the actual field work but also the method to be adopted for the subsequent office computations, that some comment thereon appears desirable.

(f) As a preliminary to its consideration, however, it is proper to recognize the generally accepted principle that where any legal subdivision

of the public domain is invaded by a segregation survey the former loses its identity as a unit of disposal, and the resultant fractional lots must depend for their area upon the data supplied by the survey, without reference to the stated area of the subdivision. This principle, while intrinsically sound, is found in practice to result in a refinement of little utility when applied to regular sections whose closure is acceptable. Its observance is therefore frequently ignored, and this is true, in particular, where the segregation of patent mineral surveys is concerned, the procedure in such cases being merely that of office protraction and computation from the assembled mineral and township records.

(g) The *extent* of any mineral segregation survey is dependent primarily upon the *condition of the section or sections invaded*, as indicated by the actual alinement and measurement of the boundaries thereof. With this fact clearly in mind, and with an equal recognition of the non-mineral character of the survey, the surveyor will, after preliminary reconnaissance, readily determine the amount of field work required in any given case. It frequently happens that a direct connection of the mineral location by a tie or ties to convenient existing and identified corners of the public-land survey, followed by a survey of the outboundaries of the mining claim or claims, thus presenting data equivalent to those supplied by a patent mineral survey, will, with the subsequent office protractions for area, be found adequate for the segregation, but this sufficiency is evident only when the section invaded is itself found to be actually conformable, within Manual limits, to the record thereof. In many other cases the actual condition of the section may be so far removed from that represented by the record that it would be impossible to assert even approximate accuracy for lot areas obtained by deducting the acreage of the mineral land, as determined by the survey, from the nominal area of the legal subdivision shown upon the township plat.

(h) It is therefore apparent that the first duty of the surveyor is to determine by retracement the actual condition of the section invaded, and provision therefore should be embodied, in future, in the instructions of the Surveyor General. If the result is satisfactory, and a reasonable agreement with the approved record is indicated, he may then proceed with the segregation survey; and upon evidence of proper closure the surveyor general's office may determine the resulting lot areas by protraction and deduction, with the assurance that no error in excess of allowable limits has been introduced. If, on the other hand, the retracement reveals radical defects in the section, and serious disagreement with the record, it will be necessary for the surveyor to subdivide the section, or so much thereof as is invaded by the mineral claims, restoring any lost corners, and locating such quarter-quarter-section corners as are required. The segregation survey will then be referable strictly to the conditions so defined, and the resultant lot areas will be calculated upon the basis of the

data furnished by the *survey* and *not* by reference to the nominal areas shown upon the township plat.

(i) Where, however, it appears upon retracement that the absence of corners, and the obliteration of other evidences of the original public land survey is so general as to require extensive restorations and a search for controlling corners remote from the section or sections affected by the segregation, the execution of which would impose upon the entryman unreasonable hardship and expense, the designated surveyor will proceed *only* with the survey of the mineral location as provided in subdivision *(g)* hereof, and will, upon transmittal of his returns to the United States Surveyor General, report to that officer the conditions which precluded his completion of the survey. Upon receipt of such report, the United States Surveyor General will, if the explanations thus submitted are acceptable, request authority from the General Land Office to employ the services of an United States surveyor for the resurvey and subdivision necessary to complete the segregation and determine the true condition of the section or sections involved. It is believed, however, that the necessity for this procedure will not frequently arise, and Surveyors General are advised that authority for such action will issue only in cases that are clearly exceptional.

(j) Regarding the limit of error applicable to segregation surveys, it appears illogical to demand greater accuracy in the subdivision than obtains in the section itself, and therefore a limit of one part in 640 in latitude and in departure may be adopted, but the surveyor should strive to reduce the error in closure wherever possible. The considerations which require great precision in an official mineral survey are not present in these cases, but the establishment of the lines and corners of the mineral location should be attended by such care and exactness of execution that their position will not require revision by the patent survey which may follow. This is highly important for the reason that while theoretically subject to such revision, the result in practice is the creation of small fractional areas of questionable utility for mining operations, and yet excluded from the agricultural classification.

(k) Upon completion of the survey and the receipt by the Surveyor General's office of the returns thereof, he will cause a critical examination to be made with reference to their accuracy and sufficiency. The field notes will be so prepared as to present, first, the record of the sectional retracement, restoration, and subdivision; second, the connection of the mineral location or locations therewith; and, finally, the record of the segregation survey proper, the latter to include a statement of the area of the mineral lands eliminated from each section. All measurements will be returned in chains and links. The title page and oaths covering the notes will be of the regulation township form (4—679, 4—680), and will contain such descriptive matter as is appropriate. One transcript of the whole will be prepared for the files of the General Land Office.

(l) The plat of survey will be prepared in triplicate, and will be of standard township size. It will exhibit only the section or sections involved, and will display an appropriate title and certificate of approval. A scale of 10 or 20 chains to the inch is suggested as convenient. The plat will be rendered strictly conformable to the field notes of the survey and will present all essential data as to courses and distances (true lines) of sectional retracements and subdivision; boundaries of the mineral location or locations; ties, intersections, etc.; and will in all cases afford information sufficient for a determination of the areas of the fractional lots created.

(m) The lots in question will be designated in the usual manner by consecutive numbers, beginning with that next higher than the series of the previous survey. Their areas will be calculated in strict conformity with the principles heretofore discussed; that is, by deduction of the returned and verified mineral area (which need not appear upon the plat) from the nominal area of the legal subdivision, where the section is in reasonable agreement with its record and requires no field subdivision, or in the case of defective sections, by balanced traverses, based upon the actual field returns of the combined subdivisional and segregation surveys.

(n) Upon completion of the office work and approval of the survey the duplicate plat and transcript of field notes will be transmitted to the General Land Office for examination and acceptance.

(o) Inquiries as to procedure in special cases, and the requests for instructions or explanation covering minor items of practice not herein noted, should be addressed to the Commissioner of the General Land Office in connection with the specific survey to which they are referable.

109. **Survey Sworn to.**—Such survey when executed must be properly sworn to by the surveyor, either before a notary public, United States Commissioner, officer of a Court of record, or before the Register or Receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

110. **Verified Plat by Surveyor General.**—Upon the filing of the plat and field notes of such survey, duly sworn to as aforesaid, with the Surveyor General, for his verification and approval, he will, if he finds the work correctly performed, approve the same, sign and date the approved plats and field notes, and thereupon transmit one copy of the plat and field notes to this office for its examination and acceptance. After this office shall have examined and accepted the returns of such survey and the plat and field notes thereof, it will duly notify the Surveyor General of its examination and acceptance, who will thereafter promptly furnish an authenticated copy of such plat to the proper local land office for filing there.

The copy of plat furnished the local office and this office must be a diagram verified by the Surveyor General, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 37 in the survey of mining claims on surveyed lands, and paragraph 108, subdivision *(m)*.

111. **Decision Does Not Award Land.**—The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

TERRITORY OF ALASKA.

112. **Rights of Canadians in Alaska.**—Section 13, Act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" in the Territory of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

113. **Regulations in Alaska.**—For the sections of the Act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the Territory of Alaska, and for the exploration and mining of tide lands and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 21 of this circular. (On p. 21 was printed the A. C. referred to.)

MINERAL LANDS WITHIN NATIONAL FORESTS.

114. **Mineral Lands Subject to Entry.**—The Act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in

the forest reserves subject to location and entry under the general mining laws in the usual manner.

The act also provides that "The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, building, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

TRANSFER OF NATIONAL FORESTS.

Act of February 1, 1905 (33 Stat., 628).

The Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March 3, 1891, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

(For further information see Use Book—Forest Service.)

SURVEYS OF MINING CLAIMS.

GENERAL PROVISIONS.

115. **Appointment of Surveyors.**—Under section 2334, Revised Statutes, the United States Surveyor General "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

116. **Persons desiring such appointment** should therefore file their applications with the Surveyor General for the district wherein appointment is asked, who will furnish all information necessary.

117. **All appointments of mineral surveyors** must be submitted to the Commissioner of the General Land Office for approval.

118. **Suspension of Surveyors.**—The surveyors general have authority to suspend or revoke the appointments of mineral surveyors at any time, for cause, and to suspend or revoke the appointments at such times as the bonds become subject to renewal under the Act of March 2, 1895 (28 Stat., 808), for reasons appearing sufficient to sustain a refusal to appoint in the first instance. The surveyors, however, will be allowed the right of appeal from the action of the Surveyor General in the usual manner. The appeal must be filed with the Surveyor General, who will at

once transmit the same, with a full report, to the General Land Office. (20 L. D., 283; amendment approved July 29, 1911.)

119. [Omitted.]

120. **Investigation of Surveyor's Charges.**—Neither the Surveyor General nor the Commissioner of the General Land Office has jurisdiction to settle differences relative to the payment of charges for field work, between mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner—*i. e.*, in the local Courts. The Department has, however, authority to investigate charges affecting the official actions of mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

121. **The surveyors general should appoint as many** competent mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

122. **The schedule of charges for office work** should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. [Omitted.]

124. **Mineral surveyors will address all official communications** to the surveyor general. They will, when a mining claim is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject matter and date of the letter. They will promptly notify the Surveyor General of any change in post-office address.

125. **Mineral surveyors should keep a complete record** of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field notes and other reports must be written in a clear and legible hand or typewritten, in non-copying ink, and upon the proper blanks furnished gratuitously by the Surveyor General's office upon application therefor. No interlineations or erasures will be allowed.

126. **Return of Survey by Surveyor.**—No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States mineral surveyor, and made in pursuance of a special order from the Surveyor General's office. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the Surveyor General's office without delay.

127. **Claimants Contract With Surveyor.**—The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

128. **Surveyor Not Act as Attorney.**—A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the Surveyor General. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest. It is preferable that both preliminary and final oaths of assistants should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense, or inconvenience would result from a strict compliance with this rule, the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper Surveyor General a full written report of the circumstances which required his stated action; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will not employ chainmen interested therein in any manner.

METHOD OF SURVEY.

129. **Survey Must Be Actual.**—The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term *survey* in this paragraph applies not only to the usual field work, but also to the examinations required for the preparation of affidavits of five hundred dollars expenditure, descriptive reports on placer claims, and all other reports.

130. **Survey of Contiguous Locations.**—The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

131. **Difference in Lines of Survey and Location.**—The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

132. **Corners Not to Be Changed.**—In view of the principle that courses and distances must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field notes.

133. **Length and Width.**—No mining claim located subsequent to May 10, 1872, should exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50-100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

134. **All mineral surveys must be made with a transit,** with or without solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing, the survey must be connected with some line the true course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

*135. **Ties to Public Survey.**—Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument.

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*Each lode claim in a group must be tied to a government corner. —42 L. D. 485.

If both are within the required distance, the connection must be with the corner of the public survey.

136. **Mineral Monuments in Suspended Township.**—Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public-land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release of the township from suspension, the position of the claim can be shown on the plat.

137. **No Choice of Tie.**—A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

138. **Establishing Corner No. 1.**—In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or location monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and location monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey. When a boundary line of a claim intersects a section line, courses and distances from point of intersection to the government corners at each end of the half mile of section line so intersected must be given.

139. **Erection of Mineral Monuments.**—In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction. (See, also, provisions of par. 39*b*.)

140. **Selection of Site.**—The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

141. **Dimensions and Marking.**—The monument should consist of a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set halfway in the ground, with a conical mound of stone 4 feet high and 6 feet base alongside. The letters U. S. L. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post 8 feet long, 6 inches square, set 3 feet in the

ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than 3 feet high and 6 feet base around it, may be used. The exact point for connection must be indicated on the monument by an X chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

142. **Ties to Monument.**—From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the location monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the locating monument, with a topographical map of its location, should be furnished the office of the Surveyor General by the surveyor.

143. **Corners may consist of—**

First—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside.

Second—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. **Marking Corners.**—All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used, its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. **Witness Corners.**—In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. **Perpetuating Corners.**—The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

147. **Tying to Official Survey.**—If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined, and actually established upon the ground. The mineral surveyor will fully and specifically state in his return *how* and by what *visible evidences* he was able to identify on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

148. **Topography.**—The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

149. **Conflicts With Other Surveys.**—If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field notes: *Provided*, That where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

150. **A lode and mill site claim in one survey** will be distinguished by the letters A and B following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States location monument.

151. **Corners of Each Claim Separately Numbered.**—When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with corner No. 1 in each case.

152. **Description Must Give Names of Claims.**—Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

153. **Areas to Be Stated.**—The total area of each location and also the area in conflict with each intersecting survey or claim should be stated. But when locations embraced in one survey conflict with each other such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

154. **Show Section, Township and Range.**—It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

155. **Address of Claimant.**—The title page of the field notes must contain the post-office address of the claimant or his authorized agent.

156. **Report of Expenditures.**—In the mineral surveyor's report of the value of the improvements all *actual* expenditures and *mining* improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

157. **What Improvements Excluded.**—The expenditures required may be made from the surface or in running a tunnel, drifts, or cross-cuts for the development of the claim. Expenditures for drill holes for the purpose of prospecting and securing data upon which further development of a group of lode mining claims held in common may be based are available toward meeting the statutory provision requiring an expenditure of five hundred dollars as a basis for patent as to all of the claims of the group situated in close proximity to such common improvement. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of and actually facilitate the extraction of mineral from the claim.

158. **Ties—Abandoned Improvements.**—All mining and other improvements claimed will be located by courses and distances from corners of the survey, or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1. Improvements made by a former locator who has abandoned his claim can not be included in the estimate, but should be described and located in the notes and plat.

159. **In case of a lode and mill site claim** in the same survey the expenditure of five hundred dollars must be shown upon the lode claim.

160. **Expenditure During Publication.**—If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey the mineral surveyor may file with the Surveyor General supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

161. **Preliminary Plat.**—The mineral surveyor will return with his field notes a preliminary plat on blank sent to him for that purpose, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

162. **Errors—Joint Survey.**—Whenever a survey has been reported in error the surveyor may, in the discretion of the Surveyor General, be required promptly to make a thorough examination upon the premises and report the result, under oath, to the Surveyor General's office. In case he finds his survey in error he will report in detail all discrepancies with the original survey and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, the Surveyor General will, if necessary, order a joint survey to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order, unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be a *joint* survey, and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

Nothing contained in the foregoing paragraph shall be construed as intending to invest Surveyors General with jurisdiction to try and determine purely adverse claims to mining ground, and the procedure herein prescribed shall not be resorted to in any case where it is apparent that the controversy is not one concerning the professional efficiency of the

surveyor, or the accuracy of results achieved by the methods employed by him in the execution of the survey, but relates substantially to the relative merits of rival claims to the same parcel of ground.

163. **Field Notes of Joint Survey.**—The mineral surveyor found in error, or, if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the Surveyor General's office.

164. **Amended Surveys—Costs.**—Inasmuch as amended surveys are ordered only by special instructions from the General Land Office, and the conditions and circumstances peculiar to each separate case and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

The expense of amended surveys, including amendment of plat and field notes, and office work in the Surveyor General's office will be borne by the claimant.

165. **The amended survey must be made** in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

166. **The field notes of the amended survey** must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

167. **Descriptive Report on Placers.**—Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field notes a descriptive report, in which will be described—

(a) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(b) The *locus* and size of streams, and such other matter as may appear upon the surface of the claims.

(c) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them.

(d) The proximity of centers of trade or residence.

(e) The proximity of well-known systems of lode deposits or of individual lodes.

(f) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(g) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(h) The true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(i) Said report must be made under oath and duly corroborated by one or more disinterested persons.

168. **The employing of claimants, their attorneys,** or parties in interest, as assistants in making surveys of mineral claims will not be allowed.

169. **The field work must be accurately and properly performed** and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

CLAY TALLMAN, *Commissioner.*

Approved:
ANDRIEUS A. JONES,
First Assistant Secretary.

*CIRCULAR TO APPLICANTS.

Applicants for Mineral Survey Orders will observe the following requirements in the conduct of their business with the Surveyor General's Office, the same being based upon the United States mining laws and circular and special instructions from the Commissioner of the General Land Office:

1. All applications for survey orders, descriptive reports on placer claims, or certificates of five hundred dollars expenditure, should be addressed to the Surveyor General and be signed by the claimants, their agents or attorney.

2. Each application should contain:

(*a*) The name of the claimant in full, and as it is desired to appear in the application for patent.

(*b*) The name of each location embraced in the claim.

(*c*) The name of the land and mining districts in which the claim is located.

(*d*) The name of the mineral surveyor to whom it is desired the order shall be issued.

3. The applicant is required to file with each application for survey order, a copy of the record of location of the claim, properly certified by the recorder of the county or mining district where the claim is situate.

4. The mineral surveyor is required to survey the claim in *strict conformity* with or *within* the lines of the location upon which the order of survey is based. The applicant is therefore advised, before filing his application, to see that his location has been made in compliance with the law and regulations, and that it properly describes the claim for which patent is to be sought.

Section 2324, United States Revised Statutes, expressly provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," and that "all records of mining claims hereafter made shall contain the name or names of the locators,

*NOTE.—This circular is part of the "Manual of Instructions for the Survey of the Mineral Lands of the United States," issued October 6, 1908. The Manual contains, also, instructions to surveyors as to the methods of obtaining a true meridian. Appendix C contains forms in use in the Surveyor General's office, which forms are found in this compilation, under the heading of APPLICATION FOR PATENT. The Manual is prepared for the use of surveyors and is furnished to them by the Surveyor General's office.

the date of the location, and such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim."

These provisions of the law must be strictly complied with in each case to entitle a claimant to a survey and patent, and therefore should a claimant under a location made *subsequent* to the passage of the mining act of May 10, 1872 (referred to in said Section 2324), who has not complied with said requirements in regard to marking the location upon the ground, and recording the same, apply for a survey, the surveyor general will decline to order it.

The only relief for a party under such circumstances will be to make a new location in conformity to law and regulations, as no survey will be approved by the surveyor general's office unless these and all other provisions of law are substantially complied with.

A lode locator may not, in the same location, lawfully include any surface area, or acquire any incidental mining rights therein, outside of the course of, or vertical planes drawn downward through, the established end lines of his claim extended in their own direction. (35 L. D. 592.)

5. The surveyor general will furnish the applicant an estimate of the cost of *platting* and other *office work* connected with the survey in his office, which amount the applicant will deposit with any assistant United States treasurer, or designated depository, in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands." The duplicate certificate issued for such deposit will be immediately forwarded to the office of the surveyor general by the applicant, who will retain the triplicate certificate for his own use and security. Under no circumstances can this deposit be made with or by the surveyor general.

Payment for *exemplified copies* of plats or other records in the office of the surveyor general will be made or remitted directly to that officer, who will promptly receipt for the same. (36 L. D. 125.)

6. The various surveyors general have schedules of rates for office work, and an estimate of the cost in any particular case may be had upon application.

Should an applicant deem an estimate excessive, he will be allowed the right of appeal to the General Land Office in the usual manner.

In transmitting such an appeal the Surveyor General should transmit therewith a full report.

7. An application for an amended survey order must be accompanied with a statement setting forth fully the reasons for the proposed amendment and all the material facts in the matter.

8. If, after having obtained a survey order, the applicant should abandon his purpose of having a survey made, he can apply the deposit, less the amount estimated for office expenses already incurred, on a survey of *another claim* if one is desired.

9. Upon discovery of any error or defect in an order the applicant is requested to return it to the Surveyor General's office for correction or amendment.

10. If, after having obtained an order for survey, the applicant should find that the record of location does not practically describe the location as staked upon the ground, he should file a certified copy of an amended location certificate, correctly describing the claim, and obtain an *amended order* for survey. (29 L. D. 718.)

11. The order of approval of surveys of mineral claims is prescribed by General Land Office circular dated March 3, 1881, as follows:

The mining survey first applied for shall have the priority of action in all its stages in the office of the Surveyor General, including the delivery thereof, over any other survey of the same ground or any portion thereof.

The Surveyor General should not order or authorize a survey of a claim which conflicts with one previously applied for until the survey first applied for has been completed, examined, approved and platted, and the plats delivered, unless the survey first authorized is not returned within a reasonable period, and the applicant for a conflicting survey makes affidavit that he believes (stating the reasons for his belief) that such first applicant has abandoned his purpose of having a survey made, or is deferring it for vexatious purposes, to-wit, to postpone the subsequent applicant, in which case the Surveyor General shall give notice of such charges to such first applicant, and call upon him for an explanation under oath of the delay. He shall also require the mineral surveyor to make a full statement in writing, explanatory of the delay; and if the Surveyor General shall conclude that good and sufficient reasons for such delay do not exist, he shall authorize the applicant for the conflicting survey to proceed with the same; otherwise the order of proceedings shall not be changed.

When the conflict does not appear until the field notes of the respective surveys are returned, then the survey first applied for should be first examined, approved, and platted, and the plats delivered before the field notes of the survey last applied for are taken up for examination or plats constructed.

Whenever an applicant for a survey shall have reason to suppose that a conflicting claimant will also apply for a survey for patent, he may give a notice in writing to the Surveyor General particularly describing such conflicting claim, and file a copy of the notice of location of such conflicting claim. In such case the Surveyor General will not order or authorize any survey of such conflicting claim until the survey first applied for has been examined, completed, approved and platted, and the plats delivered.

12. The applicant has the option of employing any United States mineral surveyor in the district to execute the order of survey, and must make satisfactory arrangements with such surveyor for the payment of his services and those of his assistants in making the survey, as the United States will not be held responsible for the payment of the same. The duty of the surveyor in any particular case ceases when he has executed the survey and files his returns of survey in the Surveyor General's office. He is not allowed to prepare for the mining claimant the papers in support of an application for patent, being precluded from acting either directly or indirectly as attorney in mineral claims. (Sec. 2334, U. S. R. S.)

13. The applicant is advised of his right to appeal to the Commissioner of the General Land Office from the approval or disapproval of the survey of his claim. The appeal must be in writing or in print, should set forth in brief and clear terms the specific points of exception to the ruling appealed from and should be transmitted through the Surveyor General's office.

SURVEYOR GENERAL'S FEES.

Estimate of Costs.

Under paragraph 91 of the land office regulations the Surveyor General is required, upon application, to make an estimate of the cost of office work in his office, which estimated amount the claimant deposits in a bank recognized as a United States Depository, to the credit of the United States Treasurer.

The schedule of estimates of cost will be approximately as stated in the following table:

For lode claim	$30.00
For placer claim	35.00
For mill-site	30.00
For mill-site included in one survey with a lode claim	20.00
For each lode claim within and included in the survey of a placer claim	20.00
For several lode locations included in one survey, the first location named	30.00
All other locations included, each	25.00
For several placer locations included in one survey, the first location named	35.00
All other locations included, each	30.00
For affidavit of $500 expenditure of improvements, after approval of survey	5.00

Return of Balance to Applicant.

If it is found, as the work progresses, that the cost will exceed the original estimate the Surveyor General will demand a further deposit to cover additional cost.

By A. C. Feb. 24, 1909, printed on page 654, it is provided that any excess over and above the actual cost of work performed shall be repaid to the claimant.

After the case is closed in the Surveyor General's office, if there be an excess of deposit, he will notify claimant to that effect and the claimant is required to fill out and swear to the following form before payment will be made to him:

To the U. S. Surveyor General, Denver, Colorado:

I hereby make application for the return of *nine dollars and fifty cents* ($9.50), being the excess or unused mining survey deposit made in connection with my application for official survey of the *Bear* lode mining claim, mineral survey No. 1917, as per Certificate No. 3000, issued by the *First National Bank of Denver*, bearing date the 5th day of January, 1916, and on oath declare that I am the identical person (or his legal representative, or the duly authorized agent of the corporation, as evidenced by authorization hereto attached), who made said payment.

T. H. REYNOLDS,
Denver, Colorado.

STATE OF COLORADO, *City and County of Denver*, ss.

Subscribed and sworn to before me this first day of December, 1916.

My commission expires March 4, 1918.

ALICE HATCH,
[SEAL] *Notary Public.*

Prior to the Act of 1909 there was no authority for the repayment of any excess, but under that act an account is required to be stated in every case where application for repayment is made. 38 L. D. 169.

*APPLICATION FOR PATENT.

The following pages are intended to contain the forms of application and proceedings to obtain patent to a group of two lodes and a mill site, in the order of time in which the several papers should be made and filed.

Request for Official Survey.

A citizen of the United States, or one who has declared his intention to become such, or a corporation chartered within the United States, being the holder of the possessory title to one or more lode claims, causes application for an official survey to be made by an

A. APPLICATION FOR ORDER FOR SURVEY.

Denver, Colo., Jan. 3, 1916.

U. S. Surveyor General, Denver, Colorado:

Sir—Carroll Carter, claimant, hereby makes application for an official survey, under the provisions of Chapter Six, Title Thirty-Two, of the Revised Statutes of the United States, and regulations and instructions thereunder, of the mining claim known as the *Busy Bee* and *Republican* lodes, and *Republican* mill site, situate in *Wisconsin Mining District, Gilpin County, Colorado,* in Sections 24 and 25, Township No. 2 South, Range No. 74 West. Said claim is based upon valid locations made on June 23, 1894, September 15, 1900, and October 25, 1905, and duly recorded on August 22, 1894, October 1, 1900, and December 9, 1905, and are fully described in the duly certified copies of the record of the location certificates, filed herewith. Said certificates contain the name of the locator, the date of location, and such a definite description of the claims by reference to natural objects or permanent monuments as will identify the claims, and said locations have been distinctly marked by monuments on the ground, so that their boundaries can be readily traced.

I request that you will send me an estimate of the amount required to defray the expenses of platting and other work in your office, required under the regulations, that I may make proper deposit therefor, and that thereupon you will cause the survey to be made by *R. L. Chase,* U. S.

*For many valuable suggestions upon points covered in this chapter, we are under obligations to Milton E. Blake, Chief of Mineral Division in the Surveyor General's office, Denver.

Mineral Surveyor, and that proper action be taken thereon by your office as required by the United States mining laws and regulations thereunder.

CARROLL CARTER,
P. O. Address, Denver, Colorado. *Claimant.*

The department requires the signature to the above application to be in the handwriting of the claimant, his agent or attorney. 29 L. D. 718.

In reply to the above application the Surveyor General furnishes the applicant with an estimate of the cost of office work. The claimant then makes a deposit of such amount in some bank recognized as a United States depository. The bank issues triplicate certificates of deposit, of which it mails the original to the Secretary of the Treasury at Washington. The duplicate is mailed by the bank or the claimant to the Surveyor General, and the triplicate the claimant retains.

This certificate is a mere receipt for money, and has no further value to the claimant except where an application has been withdrawn, in which case the unexpended balance will be allowed to apply on the survey of another claim. Par. 8, Circular, page 537.

Upon receipt of the duplicate certificate of deposit, the Surveyor General mails to the U. S. mineral surveyor designated in the application the

B. ORDER FOR MINERAL SURVEY.

DEPARTMENT OF THE INTERIOR,
Office of U. S. Surveyor General,
Denver, Colorado, Jan. 10, 1916.

To R. L. Chase, U. S. Mineral Surveyor:

Sir—Application has been filed in this office by Carroll Carter, dated January 3, 1916, for an official survey of the mining claim of Carroll Carter, known as the *Busy Bee* and *Republican* lodes and *Republican* mill site, situate in *Wisconsin Mining District, Gilpin County,* in Sections 24 and 25, Township No. 2 South, Range No. 74 West, which claim is based upon locations made on June 23, 1894, September 15, 1900, and October 25, 1905, and duly recorded on August 22, 1894, October 1, 1900, and December 9, 1905, and are fully described in the duly certified copies of the record of the location certificates, filed by the applicant for said survey, copies of which are herewith inclosed. You are hereby directed

to make the survey of said claim in strict conformity with existing laws, official regulations, and instructions thereunder, and to make proper return to this office. Said survey will be designated as Survey No. 21000 A and B.

Very respectfully,

JOHN B. MCGAURAN,
U. S. Surveyor General for Colorado.

With the order B are inclosed copies of the location certificates made in the Surveyor General's office from the certified copies filed by applicant.

The numbers of the survey lots were formerly consecutive in each mineral district, but since the abolition of mineral districts they are consecutive throughout the State, beginning with No. 4,501, with which number the new series was commenced November 30, 1886.

Survey to Conform to Record.

This order of survey "B" being received by the U. S. mineral surveyor designated in "A," he must proceed in person to the premises, make an actual survey, and mark each post with the number of the survey and the number of the corner.

The copies of location certificates mentioned as inclosed in "A" must be certified by the recorder.

The surveyor, in making his official survey, must follow the lines as staked upon the ground.

Tie to Government Corner.

The rules limit the tie line to two miles and where some claims in a group exceed that distance the entry will be rejected as to them. 42 L. D. 485.

Changing Lines After Order Received.

The Surveyor General will not allow a serious departure from the lines called for in the location certificate, without insisting upon the filing of an amended or relocation certificate in the office of the recorder of the proper county, and the

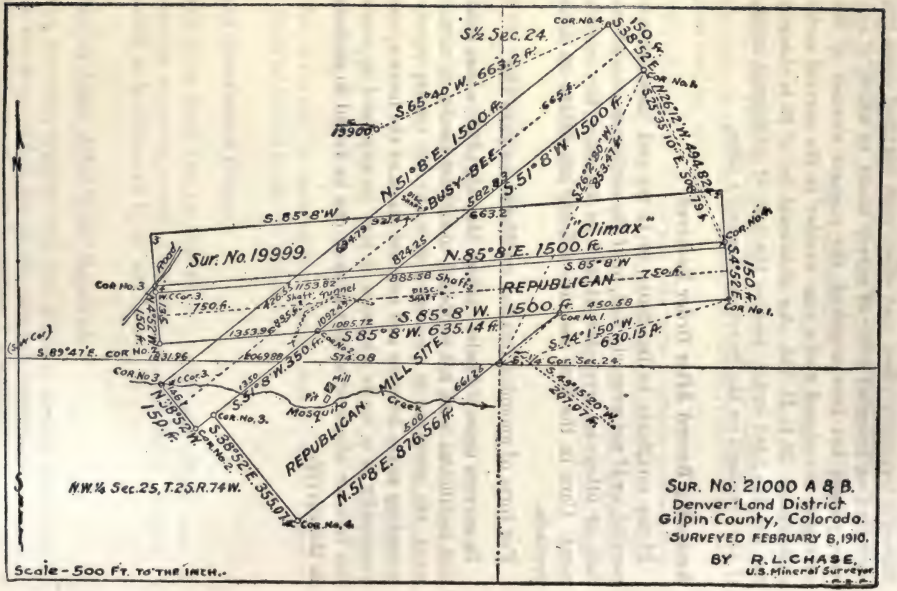
deposit of a certified copy of such amended record in the Surveyor General's office, and when such certified copy has been filed an amended order of survey issues, in which, *if any new ground has been acquired, the original number of the survey is abandoned and a new number in the current series substituted.* 29 L. D. 718. An additional fee of $5 is charged for the amended order, besides the cost of additional labor, if any, imposed on the Surveyor General's office.

Amending Record After Order Received.

If the certificate be indefinite, or if the end lines are not parallel, or if not properly tied, or if the certificate be without date or otherwise irregular, it will be returned for amendment. Care in the first instance will obviate delays on such grounds.

For form of amended location certificate see page 160.

In surveys upon old lodes (before May 10, 1872) whose location certificates were not supposed to call for course or monument, the surveyor is presumed to make his official survey according to the location and original claim of the locator, but practically it is made wherever it may be supposed to cover the vein, or wherever vacant ground can be found to include in the survey.


S½ Sec. 24.
COR. No. 4
150 Ft.
S. 38° 52' E.
COR. No. 5
S. 65° 40' W. 663.2 Ft.
N. 51° 8' E. 1500 Ft.
S. 51° 8' W. 1500 Ft.
N. 26° 12' W. 494.82 Ft.
S. 25° 35' 10" E. 504.19 Ft.
S. 26° 2' 30" W. 285.47 Ft.
Busy-Bee
S. 85° 8' W
582.82
663.2
"Climax"
Sur. No. 19999.
N. 85° 8' E. 1500 Ft.
COR. No. 6
S. 4° 52' E. 150 Ft.
COR. No. 3
W. Cor. 3.
S. 85° 8' W
REPUBLICAN
750 Ft.
Shaft
DISC. SHAFT
COR. No. 1.
S. 85° 8' W. 1560 Ft.
S. 85° 8' W. 635.14 Ft.
S. 74° 1' 50" W. 630.15 Ft.
COR. No. 2
S. 89° 47' E.
COR. No. 2
S. 14° 08
E. ¼ Cor. Sec. 24.
S. 51° 8' W. 350 Ft.
Mill
Pit
Mosquito
Creek
REPUBLICAN MILL SITE
N. 38° 52' W. 150 Ft.
S. 38° 52' E. 355.07 Ft.
N. 51° 8' E. 876.56 Ft.
COR. No. 4
N.W.¼ Sec. 25, T. 2 S. R. 74 W.
Scale - 500 Ft. to the Inch.
N
SURVEY No: 21000 A & B.
Denver Land District
Gilpin County, Colorado.
SURVEYED FEBRUARY 8, 1910.
BY R. L. CHASE,
U.S. Mineral Surveyor

In almost all cases of early location (and in many recent ones) it is advisable to make a formal relocation before asking for order for survey. This may save time in the Surveyor General's office and prevent fatal results in resisting adverse claims.

But an amended location made by one who has parted with his title will not be recognized by the Land Office. 18 L. D. 536.

For instructions as to making survey on the ground, see LAND OFFICE RULES, pp. 493, 524.

Delay to Proceed With Survey.

The first applicant has priority as long as he proceeds with diligence. When he fails to perfect, to the injury of a party desiring to proceed, the steps to be taken by the latter are indicated in Sec. 11 of the Circular, p. 537.

The survey being complete the surveyor makes and forwards to the Surveyor General a diagram of the lode, giving its corners, courses, distances, ties, conflicts, adjoiners and improvements, which is known as

C. THE PRELIMINARY PLAT.

The plat made by the surveyor was formerly treated as the official plat of the claim, from which the connected plat of all claims kept by the Surveyor General was made, but under present practice the surveyor's plat is only treated as a correction to the field notes, all official plats now being made by the Surveyor General.

Along with this diagram or preliminary plat "C," the surveyor forwards to the Surveyor General his

D. FIELD NOTES,

the following form being arranged to illustrate the more ordinary complications:

Mineral Survey No. 21000 A and B. *Denver* Land District.

FIELD NOTES.

Of the survey of the mining claim of CARROLL CARTER, known as the *Busy Bee* and *Republican* lodes, and *Republican* mill site, *Wisconsin* Mining District, *Gilpin* County, Colorado.

Sections 24 and 25, Township 2 South, Range 74 West of the 6th Principal Meridian.

Surveyed under instructions dated January 10, 1916, by *E. L. Chase*, U. S. Mineral Surveyor.

Survey commenced January 17, 1916.

Survey completed February 8, 1916.

Address of claimant: Denver, Colorado.

DATES OF LOCATIONS.

Busy Bee lode, June 23, 1894.

Republican lode, September 15, 1900.

Republican mill site, October 25, 1905.

SURVEY NO. 21000 A.—BUSY BEE LODE.

FEET.	
	Beginning at Cor. No. 1.
	A granite stone 8x15x24 ins., set 16 ins. in the ground in mound of stone chiseled B. B., 1-21000 A., whence
	The S. ¼ cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M. bears S. 26° 2′ 30″ W. 853.47 ft.
	Cor. No. 1, Sur. No. 19999 Climax lode, claimant unknown, bears S. 25° 35′ 10″ E. 508.79 ft.
	Kingston Peak bears S. 73° 28′ W.
	Thence S. 51° 8′ W.
582.83	Intersect line 2-3, Sur. No. 19999 Climax lode at S. 85° 8′ W. 663.20 ft. from Cor. No. 2.
824.25	Intersect line 3-4, Republican lode of this survey.
851.07	Intersect line 4-1, Sur. No. 19999 Climax lode at S. 85° 8′ W. 885.58 ft. from Cor. No. 1.
1092.49	Cor. No. 2, Sur. No. 21000 B., Republican mill site, also intersect line 1-2, Republican lode of this survey.
1218.55	Intersect the S. boundary Sec. 24, at N. 89° 47′ W. 574.08 ft. from S. ¼ Cor. said section.
1350.	Mosquito Creek, 4 ft. wide, 4 ins. deep, course East.
1442.49	Cor. No. 3 Sur. No. 21000 B., Republican mill site.
1500.	To Cor. No. 2.
	A granite stone 6x12x28 ins., set 14 ins. in the ground with mound of earth and stone chiseled B. B. 2-21000 A., whence
	A pine tree 14 ins. in diameter, blazed and scribed B.xT. B.B., 2-21000 A. bears S. 64° 43′ E. 52.1 ft.
	Kingston Peak bears S. 75° 45′ W.
	Thence N. 38° 52′ W.
146.10	Witness Corner to Cor. No. 3.
	A quartz stone 8x8x24 ins. set 12 ins. in the ground with mound of earth and stone chiseled W.C., B.B., 3-21000 A.

150. To Cor. No. 3.

Not set, as it falls in center of Mosquito Creek, 3 ft. wide, course East, where permanent corner could not be established.

Thence N. 51° 8′ E.

96.77 Intersect the S. boundary Sec. 24, at S. 89° 47′ E. 1831.96 ft. from the S.W. Cor. said Section.

185.13 Intersect line 1-2, Republican lode of this survey.

426.55 Intersect line 4-1, Sur. No. 19999, Climax lode, at S. 85° 8′ W. 1153.82 ft. from Cor. No. 1.

453.37 Intersect line 3-4, Republican lode of this survey.

694.79 Intersect line 2-3, Sur. No. 19999, Climax lode, at S. 85° 8′ W. 931.44 ft. from Cor. No. 2.

1500. To Cor. No. 4.

A gneiss stone 6x8x28 ins. set 14 ins. in the ground with mound of earth and stone chiseled B.B., 4-21000 A., whence

Cor. No. 2, Sur. No. 19900, Black Mask lode, claimant unknown, bears S. 65° 40′ W. 663.2 ft.

Thence S. 38° 52′ E.

150. To Cor. No. 1, the place of beginning.

REPUBLICAN LODE.

Beginning at Cor. No. 1.

A granite stone 6x12x24 ins. set 12 ins. in ground in mound of stone chiseled R., 1-21000 A., whence

The S. ¼ Cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M. bears S. 74° 1′ 50″ W. 630.15 ft.

A pine tree 10 ins. in diameter blazed and scribed B.T. R. 1-21000 A. bears S. 26° 23′ W. 15.1 ft.

Thence S. 85° 8′ W.

450.58 Cor. No. 1, Sur. No. 21000 B., Republican mill site.

1085.72 Cor. No. 2, Sur. No. 21000 B., Republican mill site, also intersect line 1-2, Busy Bee lode of this survey.

1353.96 Intersect line 3-4, Busy Bee lode of this survey.

1500. To Cor. No. 2.

A granite stone 5x14x26 ins. set 14 ins. in the ground in mound of stone chiseled R., 2-21000 A., whence

No bearings available.

Thence N. 4° 52′ W.

135. Witness Corner to Cor. No. 3, also Cor. No. 4, Sur. No. 19999, Climax lode.

A granite stone 5x12x26 ins. set 14 ins. in the ground with mound of earth and stone chiseled W. C. R., 3-21000 A., and C. 4-19999, whence

Kingston Peak bears S. 72° 56′ W.

A balsam tree 12 ins. in diameter blazed and scribed B.xT. W. C. R., 3-21000 A., and B.xT.C.-4-19999 bears S. 5° 27′ W. 46.1 ft.

150. To Cor. No. 3.

On line 3-4, Sur. No. 19999, Climax lode.

Not set, as it falls in road, 5 ft. wide, course N. 49° E., where permanent corner could not be established.

Thence N. 85° 8′ E.

368.42 Intersect line 3-4 Busy Bee lode of this survey.

636.66 Intersect line 1-2, Busy Bee lode of this survey.

1500. To Cor. No. 4.

On line 1-2, Sur. No. 19999, Climax lode.

A granite stone 3x12x24 ins. set 12 ins. in the ground with mound of earth and stone chiseled R., 4-21000 A., whence

Cor. No. 1, Busy Bee lode of this survey bears N. 26° 12′ W. 494.82 ft.

No bearings to local objects available.

Thence S. 4° 52′ E.

15. Cor. No. 1, Sur. No. 19999, Climax lode.

150. To Cor. No. 1, the place of beginning.

Variation at all corners, 14° 15′ E.

Lode Lines.

As near as can be determined from present developments the veins of the Busy Bee and Republican lodes run from their respective discovery points as follows:

Busy Bee lode, N. 51° 8′ E. 665 ft. and S. 51° 8′ W. 835 ft.

Republican lode, N. 85° 8′ E. 750 ft. and S. 85° 8′ W. 750 ft.

*Area.

	ACRES.
Total area Busy Bee lode	5.165
Area in conflict with Sur. No. 19999, Climax lode	0.924
Total area Republican lode	5.165
Area in conflict with Sur. No. 19999, Climax lode	0.516
Busy Bee lode of this survey	0.924
Busy Bee lode of this survey, exclusive of its conflict with Sur. No. 19999, Climax lode	0.832

*The field notes should not show exclusions as the applicant is required to show them in his application and notices. (Manual of Instructions, referred to in note on page 535.

SURVEY NO. 21000 B.—REPUBLICAN MILL SITE.

Beginning at Cor. No. 1.

On line 1-2, Sur. No. 21000 A., Republican lode at S. 85° 8′ W. 450.58 ft. from Cor. No. 1.

A granite stone 8x12x28 ins. set 12 ins. in the ground with mound of stone chiseled R.M.S. 1-21000 B., whence

The S. ¼ Cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M. bears S. 49° 15′ 20″ W. 207.07 ft.

A pine tree 10 ins. in diameter blazed and scribed B.xT., R.M.S. 1-21000 B., bears S. 21° 7′ E. 16 ft.

Thence S. 85° 8′ W.

635.14 To Cor. No. 2.

At the intersection of lines 1-2, Sur. No. 21000 A., Busy Bee and Republican lodes.

A granite stone 8x14x26 ins. set 12 ins. in the ground with mound of stone chiseled R.M.S. 2-21000 B., whence no bearings available.

Thence S. 51° 8′ W.

126.06 Intersect the S. boundary Sec. 24 at S. 89° 47′ E. 2069.88 ft. from S.W. Cor. said Section.

257.51 Mosquito Creek, 4 ft. wide, 4 ins. deep, course East.

350. To Cor. No. 3.

On line 1-2, Sur. No. 21000 A., Busy Bee lode.

A quartz stone 8x8x26 ins. set 14 ins. in the ground with mound of earth and stone chiseled R.M.S. 3-21000 B., whence

No bearings available.

Thence S. 38° 52′ E.

355.07 To Cor. No. 4.

A granite stone 8x14x26 ins. set 14 ins. in the ground with mound of earth and stone chiseled R.M.S. 4-21000 B., whence

A pine stump 20 ins. in diameter showing 16 ins. above ground, scribed B.xS., R.M.S. 4-21000 B., bears S. 50° 21′ W. 17 ft.

Thence N. 51° 8′ E.

500. Mosquito Creek, 4.5 ft. wide, 4 ins. deep, course Easterly.

661.25 Intersect the S. boundary Sec. 24 at N. 89° 47′ W. 10.76 ft. from S. ¼ Cor. said Section.

876.56 To Cor. No. 1, the place of beginning.

Variation at all corners, 14° 15′ E.

Containing 5 acres.

The surveys of the Busy Bee and Republican lodes and the Republican mill site are identical with their respective locations as staked upon the ground.

Location.

This claim is located in the S. ½ Sec. 24 and the N.W. ¼ Sec. 25, T. 2 S., R. 74 W. of the 6th P. M.

Expenditure of Five Hundred Dollars.

I certify that the value of the labor and improvements made upon or for the benefit of each of the lode locations embraced in said mining claim by the claimant or his grantors is not less than five hundred dollars and that said improvements consist of:

No. 1. The discovery shaft of the Busy Bee lode, the center of which being the discovery point is on the center line 665 ft. from the center of line 4-1 3½x7 ft. in the clear, 40 ft. deep timbered. Value $500.

No. 2. A shaft, the center of which bears N. 39° 15′ E. 430 ft. from Cor. No. 2, Busy Bee lode, 4½x7 ft., 15 ft. deep. Value $100.

No. 1. The discovery shaft of the Republican lode, the center of which being the discovery point, is on the center line 750 ft. from the center of line 4-1, 4x6 ft., 25 ft. deep in earth and rock. Value $275.

No. 2. A shaft which bears from Cor. No. 1, Republican lode, N. 86° 10′ W. 684 ft., 5x8 ft., 25 ft. deep, timbered. Value $300.

No. 3. A shaft which bears from Cor. No. 1, Republican lode N. 88° W. 745 ft., 4x6 ft., 40 ft. deep, timbered. Value $500.

No. 4. A shaft which bears from Cor. No. 1, Republican lode N. 84° 25′ W. 690 ft., 3x5 ft., 10 ft. deep in earth and rock. Value $100.

A tunnel, the mouth of which bears from Cor. No. 2, Busy Bee lode, N. 48° 15′ E. 333 ft., 3½x6 ft., running N. 23° E. 90 ft.; thence N. 60° 30′ E. 90 ft.; thence S. 78° E. 100 ft. to breast. Value $4,000.

I am advised by the applicant that this tunnel has been constructed as a common improvement subsequent to the location of the Busy Bee and Republican lodes of this survey and the time since which contiguity and common ownership have prevailed as between said lodes, said lodes being all the lode locations owned by him and forming a contiguous group within the range of benefit and that no portion of or interest in the value of the tunnel has been heretofore credited or applied as patent expenditures.

The surface rises rapidly from the mouth of the tunnel in a Northerly and Northeasterly direction, Cor. No. 4 of the Busy Bee lode being approximately 600 ft., and Cor. No. 4 of the Republican lode being approximately 400 ft. above the tunnel level.

The tunnel continued with drifts and cross-cuts run therefrom will economically and advantageously develop both lodes.

An undivided one-half interest in the value of the tunnel is hereby credited as patent expenditure to each of the Busy Bee and Republican lodes.

Other Improvements.

A mill building 20x25 ft., the N.W. Cor. of which bears from Cor. No. 2, Republican mill site, S. 6° 20′ E. 153 ft., course of long sides, N. 30° E. Claimant herein.

A pit for water wheel, the N.W. Cor. of which bears from Cor. No. 2, Republican mill site, S. 5° 30′ E. 182.5 ft., 8x20 ft., 10 ft. deep, cribbed with logs. Course of long sides, N. 30° E. Claimant herein.

Instrument.

The surveys were made with a Peter Heer Light Mountain Transit.

The courses were deflected from the true meridian as determined by direct solar observations.

The distances were measured with 600 ft. and 100 ft. steel tapes.

NOTE.

The disagreements between these field notes and the location certificate of the Busy Bee lode as regards the courses of the lode and boundary lines and the position of the discovery shaft on the lode line and the disagreement between these field notes and the location certificate of the Republican lode as regards the position of the discovery shaft on the lode line, are due to errors in the certificates.

Report.

All lines and connections of these surveys were run direct upon the ground.

I found the S. ¼ Cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M. to be a granite stone showing 5 ins. above ground marked ¼ on North face.

Sur. No. 19900, Black Mask lode.

Cor. No. 2 is a granite stone 4x10 ins. showing 8 ins. above ground chiseled 2-19900, B.M.

Sur. No. 19999, Climax lode.

Cors. Nos. 1, 2, 3 and 4 are granite stones properly set and marked and retain their correct relative positions as approved.

From Cor. No. 1, the S. ¼ Cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M. bears S. 62° 37′ W. 669.39 ft. instead of S. 62° 30′ W. 672 ft. as approved.

FINAL OATHS OF SURVEYORS.

LIST OF NAMES.

A list of the names of the individuals employed by R. L. Chase, United States Mineral Surveyor, to assist in running, measuring, and marking the

lines, corners, and boundaries described in the foregoing field notes of the survey of the mining claim of Carroll Carter, known as the Busy Bee and Republican lodes and Republican mill site, and showing the respective capacities in which they acted.

L. E. LEMEN, Chainman.
OTTO SHATZ, Axman.

FINAL OATHS OF ASSISTANTS.

We, L. E. Lemen and Otto Shatz, do solemnly swear that we assisted R. L. Chase, United States Mineral Surveyor, in marking the corners and surveying the boundaries of the mining claim of Carroll Carter, known as the Busy Bee and Republican lodes and Republican mill site, represented in the foregoing field notes as having been surveyed by said mineral surveyor and under his direction; and that said survey has been in all respects, to the best of our knowledge and belief, faithfully and correctly executed, and the corner and boundary monuments established according to law and the instructions furnished by the United States Surveyor General for Colorado.

L. E. LEMEN, Chainman.
OTTO SHATZ, Axman.

Subscribed and sworn to by the above-named persons before me this 10th day of February, 1916.

My commission expires March 4, 1918. ALICE HATCH,
(SEAL) Notary Public.

FINAL OATH OF U. S. MINERAL SURVEYOR.

I, R. L. Chase, U. S. Mineral Surveyor, do solemnly swear that, in pursuance of instructions received from the United States Surveyor General for Colorado, dated January 10, 1916, I have, in strict conformity to the laws of the United States, the official regulations and instructions thereunder, and the instructions of said Surveyor General, faithfully and correctly executed the survey of the Mining Claim of Carroll Carter, known as the Busy Bee and Republican lodes and Republican mill site, situate in Wisconsin Mining District, Gilpin County, Colorado, in Sections 24 and 25, Township No. 2 S., Range No. 74 W. of the 6th P. M., and designated as Survey No. 21000 A. and B., as represented in the foregoing field notes, which accurately show the boundaries of said mining claim as distinctly marked by monuments on the ground, and described in the attached copy of each location certificate, which was received by me from the Surveyor General with said instructions, and that all the corners of said survey have been established and perpetuated in strict accordance with the law, official regulations and instructions thereunder; and I do further solemnly swear that the foregoing are the true and original field notes of said survey and my report therein, and that the labor expended and improvements made upon or for the benefit of each of the lode locations embraced in said mining claim by claimant or his grantors are as therein fully

stated, and that the character, extent, location, and itemized value thereof are specified therein with particularity and full detail, and that no portion of or interest in said labor or improvements so credited to this claim has been included in the estimate of expenditures upon any other claim.

R. L. CHASE,
U. S. Mineral Surveyor.

Subscribed and sworn to by the said R. L. Chase, U. S. Mineral Surveyor, before me, a Notary Public in and for the City and County of Denver, Colorado, this 12th day of February, 1916.

My commission expires March 4, 1918. ALICE HATCH,
(SEAL) Notary Public.

The preliminary Plat "C" and Field Notes "D" containing, besides what are strictly the Field Notes, also the memoranda of improvements, list of helpers, etc., with certificate and affidavit as above given, and the location certificates received by the surveyor with the order "B" are then forwarded to the Surveyor General, who compares the plat, reviews the notes, etc., and if errors appear, as they often do, or if he can not make the connections agree with his "connected plat," they are returned for correction, but if correct, the Field Notes are endorsed as follows:

E. SURVEYOR GENERAL'S CERTIFICATE OF APPROVAL OF FIELD NOTES AND SURVEY OF MINING CLAIM.

DEPARTMENT OF THE INTERIOR,
Office of the U. S. Surveyor General,
Denver, Colo., April 5, 1916.

I, U. S. Surveyor General for Colorado, do hereby certify that the foregoing and hereto attached Field Notes and Return of the Survey of the Mining Claim of Carroll Carter, known as the Busy Bee and Republican lodes and Republican mill site, situate in Wisconsin Mining District, Gilpin County, Colorado, in Sections 24 and 25, Township No. 2 S., Range No. 74 W. of the 6th P. M., designated as Survey No. 21000 A. and B., executed by R. L. Chase, U. S. Mineral Surveyor, February 8, 1916, under my instructions dated January 10, 1916, have been critically examined and the necessary corrections and explanations made, and the said Field Notes and Return, and the Survey they describe, are hereby approved. A true copy of the copy of each location certificate filed by the applicant for survey is included in the field notes.

JOHN B. MCGAURAN,
U. S. Surveyor General for Colorado.

The field notes "D" endorsed with the official approval "E" are then bound and kept permanently for reference in the Surveyor General's office after he has caused to be made from them

F. THE FINAL PLAT.

which is first sent by him to the General Land Office at Washington in compliance with Regulation 34, where the Commissioner has the necessary number of photolithographic copies made, which are, with the original plat, returned to the Surveyor General. The original is retained in the Surveyor General's office, one copy is forwarded by the Surveyor General to the proper local land office and three copies are forwarded to the applicant or his agent or attorney; one for posting on the lode claims, one for posting on the mill site and one for filing in the local land office with the first set of papers.

Extra photolithographic copies of the final plat may be obtained from the Surveyor General at nominal cost.

The original and each copy of the final plat "F" is certified by endorsement thereon, as follows:

G. SURVEYOR GENERAL'S APPROVAL OF SURVEY AND CERTIFICATE OF $500 IMPROVEMENTS.

Dates of location, *Busy Bee* lode, *June* 23, 1894; *Republican* lode, *Sept.* 15, 1900; *Republican* mill site, *Oct.* 25, 1905. Mineral Survey No. 21000, *Denver* land district.

Plat of the claim of *Carroll Carter*, known as the *Busy Bee and Republican* lodes and *Republican* mill site, *Wisconsin* mining district, *Gilpin* County, Colorado, containing an area of 8.058 acres. Scale of 200 feet to the inch. Variation 15° 20′ east. Surveyed by *E. L. Chase*, U. S. Mineral Surveyor, Feb. 8, 1916.

The original field notes of the survey of the mining claim of *Carroll Carter*, known as the *Busy Bee and Republican* lodes and *Republican* mill site from which this plat has been made under my direction, have been examined and approved, and are on file in this office, and I hereby certify that they furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof. I further certify that five hundred dollars' worth of labor has been expended or improvements made upon said mining claim by *claimant* or his grantors and that

said improvements consist of *six shafts and a tunnel*, as appears by the affidavit of the mineral surveyor; that the location of said improvements is correctly shown upon this plat, and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim.

And I further certify that this is a correct plat of said mining claim made in conformity with said original field notes of the survey thereof, and the same is hereby approved.

JOHN B. MCGAURAN,
U. S. Surveyor General for Colorado.

U. S. Surveyor General's Office, Denver, Colo.
April 5, 1916.

When the improvements are completed, pending publication, the Surveyor General makes a separate certificate.—See p. 595.

The amount of improvements is to be found by the Surveyor General or his deputy, or from the testimony of witnesses.—*U. S. v. King*, 83 F. 188, 27 C. C. A. 509. See L. O. Reg. 49.

The certificate is not conclusive upon the department which may require further showing. 43 L. D. 152.

Along with the three copies of the final plat "F," with its endorsement "G" the Surveyor General forwards to the claimant or his attorney or agent, the

H. TRANSCRIPT OF FIELD NOTES, otherwise called

"APPROVED FIELD NOTES."

This instrument "H" is verbatim the same as "D," including all its exhibits, but not the Surveyor General's certificate "G." Instead of the certificate "G" such transcript is certified as follows:

I. U. S. SURVEYOR GENERAL'S FINAL CERTIFICATE ON FIELD NOTES.

DEPARTMENT OF THE INTERIOR,
Office of U. S. Surveyor General,
Denver, Colo., April 5, 1916.

I, U. S. Surveyor General for Colorado, do hereby certify that the foregoing transcript of the Field Notes, return and approval of the survey of the mining claim of Carroll Carter, known as the Busy Bee and Republican lodes and Republican mill site, situate in Wisconsin mining district, Gilpin County, Colorado, in Sections 24 and 25, Township No. 2

S., Range No. 74 W. of 6th P. M., and designated as Survey No. 21000 A. and B., has been correctly copied from the originals on file in this office; that said Field Notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

And I further certify that five hundred dollars' worth of labor has been expended or improvements made upon or for the benefit of each of the lode locations embraced in said mining claim by claimant or his grantors, and that said improvements consist of six shafts and a tunnel, as appears by the affidavit of the mineral surveyor, and that no portion of or interest in said labor or improvements has been included in the estimate of expenditures upon any other claim.

I further certify that the plat thereof, filed in the U. S. Land Office at Denver, is correct and in conformity with the foregoing Field Notes.

JOHN B. MCGAURAN,
U. S. Surveyor General for Colorado.

These matters are all preliminary to the application for patent *proper* which is made to the local land office, these proceedings in the Surveyor General's office being necessary because each lode claim must be separately surveyed, whereas in case of agricultural land a party simply enters upon a particular quarter section which has been already surveyed and platted.

Delivery of Papers to the Attorney.

The above transcript "H" received from the Surveyor General which is generally termed the "Approved Field Notes," the claimant then delivers, along with the plats or diagrams received from the same office, to his attorney, who is supposed to supervise the signing and filing of all the subsequent papers, and takes charge of the application from this point.

Respective Duties of Surveyor and Attorney.

The U. S. Mineral surveyors are not allowed to act as attorneys.—Rule 128. The surveyor's services seem properly to end with the preparation of papers for the Surveyor General's office, Par. 12, Cir. p. 538. The attorney makes out and

supervises all papers intended for the land office. The surveyor's aid should not, however, be discarded pending the application, as with many of the forms he is more familiar than attorneys generally are. The profession ought not to object to surveyors filling out the ordinary blanks, especially in cases where no adverse claim is expected, nor to their attending to posting, publication, proofs of citizenship, etc., if they will not attempt to make out the location and relocation certificates—which are strictly legal papers—the interference of the surveyors in these matters generally leaving applicants in a position where they seriously need an attorney's advice, if not already too late to be of service. And in case of land office contest any interference by the surveyor would be officious and reprehensible.

The claimant or his attorney then prepares five copies of "K": One for posting on the lode claim, one on the mill site, one to be attached to proof of posting, one for publication in newspaper and one for posting in Land Office,

K. NOTICE OF APPLICATION FOR U. S. PATENT.

SURVEY NO. 21000 A. AND B.

U. S. LAND OFFICE, Denver, Colo., April 15, 1916.

Notice is hereby given that in pursuance of an Act of Congress, approved May 10, 1872, Carroll Carter, whose postoffice address is Denver, Colorado, has made application for a patent for 1500 linear feet on the Busy Bee and Republican lodes respectively, bearing gold and silver, the same being 835 feet southwesterly and 665 feet northeasterly on said Busy Bee lode, and 750 feet easterly and 750 feet westerly on said Republican lode, from the respective discovery shafts thereon, with surface ground 150 feet in width on each of said lodes, and for the Republican mill site, all situate in Wisconsin mining district, Gilpin County, State of Colorado, and described by the official plat and by the field notes on file in the office of the register of Denver land district, Colorado, as follows, viz:

BUSY BEE LODE, SURVEY NO. 21000 A.

Beginning at corner No. 1, whence the S. ¼ Cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M., bears S. 26° 2′ 30″ W. 853.47 feet.

Cor. No. 1, Sur. No. 19999, Climax lode, claimant unknown, bears S. 25° 35′ 10″ E. 508.79 feet.

Thence S. 51° 8′ W. 1500 feet to Cor. No. 2. Thence N. 38° 52′ W. 146.10 feet to Witness corner to Cor. No. 3, same course, 150 feet to Cor. No. 3 (not set because it falls in center of Mosquito Creek). Thence N. 51° 8′ E. 1500 feet to Cor. No. 4. Thence S. 38° 52′ E. 150 feet to Cor. No. 1, the place of beginning.

REPUBLICAN LODE, SURVEY NO. 21000 A.

Beginning at Cor. No. 1, whence the S. ¼ Cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M., bears S. 74° 1′ 50″ W. 630.15 feet.

Thence S. 85° 8′ W. 1500 feet to Cor. No. 2. Thence N. 4° 52′ W. 150 feet to Cor. No. 3. Thence N. 85° 8′ E. 1500 feet to Cor. No. 4. Thence S. 4° 52′ E. 150 feet to Cor. No. 1, the place of beginning; containing 8.058 acres, exclusive of Sur. No. 19999, Climax lode.

REPUBLICAN MILL SITE, SURVEY NO. 21000 B.

Beginning at Cor. No. 1, whence S. ¼ Cor. Sec. 24, T. 2 S., R. 74 W. of the 6th P. M., bears S. 49° 15′ 20″ W. 207.07 feet. Thence S. 85° 8′ W. 635.14 feet to Cor. No. 2. Thence S. 51° 8′ W. 350 feet to Cor. No. 3. Thence S. 38° 52′ E. 355.07 feet to Cor. No. 4. Thence N. 51° 8′ E. 876.56 feet to Cor. No. 1, the place of beginning, containing 5 acres. Said claim forming a portion of the S. ½ of Sec. 24, and the N. W. ¼ of Sec. 25, T. 2 S., R. 74 W. of the 6th P. M.

Adjoining claim, as shown by the plat of survey, is the Climax lode, Survey No. 19,999.

Date of posting this notice on claim, April 15, 1916.

CARROLL CARTER.

Witness:
John C. Clark.
B. F. Pinson.

Naming Adjoining Claims.

The Regulations (*Rule* 39) require the notice to give "the names of adjoining and conflicting claims as shown by the Plat of Survey"—29 L. D. 250—and by *Rules* 38 and 149, all conflicts with surveyed claims, and with unsurveyed claims intended to be excluded, are required to be shown in the field notes.

If the notice is defective, as by insufficient description, the entry will be canceled.—31 L. D. 415; 37 L. D. 365.

One of the notices "K" should be at once posted on one of the lode claims, along with one of the certified diagrams

received from the Surveyor General, and a second notice "K" and a second diagram should be posted on the mill site; the notice and plat being loosely attached, or, as more usual, placed side by side, in some conspicuous place on the claim in presence of two persons who attach their signatures as shown upon form "K."

Separate posting of the notice and plat on the mill site is required by *Rule* 63.

Where two contiguous mill sites are applied for, a single notice on one of them is sufficient. 40 L. D. 313.

Another of the notices "K" is attached to

L. PROOF OF POSTING NOTICE AND DIAGRAM ON THE CLAIM.

STATE OF COLORADO, }
City and County of *Denver*. } ss.

John C. Clark and *B. F. Pinson*, each for himself, and not one for the other, being first duly sworn according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and was present on the 14th day of April, 1916, when a plat representing the claim of *Carroll Carter*, and certified as correct by the United States Surveyor General of Colorado, and designated by him as lot No. 21000 A. and B. together with a notice of the intention of said *Carroll Carter* to apply for a patent for the mining claim and premises so platted was posted in a conspicuous place upon said mining claim and mill site, to wit: at the mouth of the tunnel on the Busy Bee lode and on the outside of the door of the mill on said mill site, where the same could be easily seen and examined. A copy of the notice so posted upon said claim, and upon said mill site, is herewith attached and made a part of this affidavit.

JOHN C. CLARK,
B. F. PINSON.

Subscribed and sworn to before me this 16th day of April, A. D. 1916, and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit and the attached notice were read by each of them before their signatures were affixed thereto, and the oath made by them.

My commission expires March 4, 1918. ALICE HATCH,
(SEAL) *Notary Public.*

Rulings as to Posting.

The notice "K" must remain posted on the land office bulletin during the whole period of sixty days—and the 60 days

do not begin to run until it is posted.—1 L. D. 584, Rev. Ed. 572, 5 L. D. 510.

Posting notice inside an *open* shaft house or on the shaft house held to be in a "conspicuous place."—9 L. O. 113, 22 L. D. 624; enclosing notice and plat in oil-cloth envelope, although appropriately marked and tacked to a board over an open cut, held not to comply with the statute.—36 L. D. 199, over-ruling 33 L. D. 238; placing notice in a box on the ground among large boulders and not near shaft, held not a conspicuous place.—21 L. D. 336.

The form "L" is subscribed and sworn to by at least two posting witnesses. The applicant does not sign it, and should not be one of the two witnesses.

If the affidavit filed is defective because sworn to out of the land district, it can not be cured by the subsequent filing of a properly verified affidavit.—37 L. D. 155.

Where the notice was posted outside the claim the entry was canceled. 43 L. D. 396.

The fourth notice "K," signed by the applicant, but not by the witnesses, goes with the third of the plats received from the Surveyor General (page 554), when it is sent with the first set of papers to the land office, where the register attaches his attesting signature, and it will remain posted in the land office, while its fellow notice and plat are standing on the claim during the period of publication of the fifth notice "K."

The next paper to be prepared is the

M. APPLICATION FOR PATENT.

STATE OF COLORADO, }
City and County of *Denver*. } ss.

Application for patent for the *Busy Bee and Republican lode mining claims and the Republican mill site.*

To the Register and Receiver of the U. S. Land Office at *Denver, Colorado:*

Carroll Carter, whose P. O. address is *Denver, Colorado*, being duly sworn according to law, deposes and says that in virtue of a compliance with the mining rules, regulations and customs, *by himself and his grantors, he*, the applicant for patent herein, has become the owner

of and is in the actual, quiet and undisturbed possession of 1500 linear feet *respectively of the Busy Bee and Republican* veins, lodes or deposits, bearing *gold and silver*, together with surface ground 150 feet in width on each of said lodes for the convenient working thereof and *the Republican mill site containing five acres* as allowed by local rules and customs of miners, said mineral claims, veins, lodes or deposits and surface ground being situate in *Wisconsin* Mining District, county of *Gilpin* and State of Colorado, and being more particularly set forth and described in the official field notes of survey thereof, hereto attached, dated April 5, A. D. 1916, and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of himself, to said mining claims, veins, lodes or deposits and surface ground and said mill site so surveyed and platted are substantially as follows, to wit:

The Busy Bee and Republican lodes and said mill site were located on *June* 23, 1894, *September* 15, 1900, and *October* 25, 1905, respectively, by *James A. McFadden*, who located the same as mining claims and as a mill site of the length, width and surface ground aforesaid in full compliance with all local rules and regulations, the laws of the State of Colorado and of the United States relating to mining claims.

The said discoverer and locator conveyed all his interest in the claim to *Chas. O. Baxter* and *Frank M. Taylor*, who by divers intermediate conveyances transferred the same to applicant, who thereupon took possession and is the sole present owner, which will more fully appear by reference to the copy of the original record of location and the abstract of title herewith filed;

The value of the labor done and improvements made upon or for the benefit of each of the lode locations embraced in said mining claims by *the applicant and his grantors* being equal to the sum of five hundred dollars; said improvements consist of *six shafts and a tunnel*, but expressly excepting and excluding from this application *all that portion of the ground embraced in mining claim or survey designated as lot No.* 19,999, *Climax lode.*

That the veins in said lodes are well defined quartz veins in granite and are disclosed in their respective discovery shafts and in the tunnel which has been run to cut said lodes. The mineral contained in said veins is gold and silver bearing. About 100 tons of ore have been extracted from the vein on said *Busy Bee lode*, yielding a value of $10 per ton and a like quantity of ore has been extracted from the vein on the *Republican lode* yielding a value of $15 per ton. That a fifty-stamp mill has been erected on said mill site for the purpose of treating the ores to be extracted from said lode claims.

In consideration of which facts, and in conformity with the provisions of Chapter six of Title thirty-two of the Revised Statutes of the United

States, application is hereby made for and in behalf of said *Carroll Carter* for a patent from the United States for the said *Busy Bee and Republican* mining claims, veins, lodes, deposits and the surface ground so officially surveyed and platted and the said *Republican mill site.*

CARROLL CARTER.

Subscribed and sworn to before me this 17th day of *April*, A. D. 1916, and I hereby certify that the foregoing affidavit, to which was attached the field notes of survey of the said *Republican mill site and Busy Bee and Republican* mining claims, was read and examined by him before his signature was affixed thereto and the oath made by him.

My commission expires March 4, 1918. ALICE HATCH,
(SEAL) *Notary Public.*

Where an application is filed in the land office without proof that the plat and notice have been posted on the claim as required by R. S. Sec. 2325, such application has been held void.—1 L. D. 557, Rev. Ed. 545, 34 L. D. 583.

This application "M" is attached to the transcript "H," commonly styled "The Approved Field Notes."

At the same time there should be prepared:

N.—The abstract of Title.

O.—The proof of citizenship.

P.—The publisher's agreement.

Q.—The publication notice.

Z.—The non-mineral affidavit for mill site, page 581.

AA.—The proof of mill site used for mining or milling purposes.—Page 581.

These papers with those already referred to complete the first set of papers, to-wit:

N. ABSTRACT OF TITLE.

STATE OF COLORADO, } ss.
County of *Gilpin.* }

I, *Frank G. Moody*, Clerk and *ex officio* Recorder of said County, do hereby certify that the foregoing is a true, full and correct abstract of title of the *Busy Bee and Republican lodes and the Republican mill site* therein described, as the same appears of record in my office, and shows all location certificates, deeds or other instruments appearing of record purporting to convey or affect the same.

Witness my hand and the seal of said County, this 16th day of *April*, A. D. 1916. FRANK G. MOODY,
(COUNTY SEAL) Recorder.

It should contain a memorandum of the location certificates, including any amended location certificates, and the usual memoranda of the deeds and other instruments appearing of record in his office, and should be brought down to a date reasonably near the date of presenting the application, and should be certified to by the Recorder or an abstract company. As soon as practicable a supplementary abstract to include the date of filing the application must be filed before publication will be ordered. Rule 42.

The abstract often contains copies of the location certificates, and in such case the Recorder's certificate should be varied to state that it contains true copies thereof; but the better practice is to mail with the application papers, certified copies of the location certificates *separately*, and the abstract proper, in such case will contain only the memorandum of the location certificate with names, dates, etc., in the same manner as the memoranda of the separate deeds.

When the applicant for patent is the original locator himself (and there have been no transfers of title), he should file as his abstract, a copy of his location certificates certified as follows:

STATE OF COLORADO, }
County of *Gilpin*. } ss.

I, *Frank G. Moody*, Clerk and *ex officio* Recorder of said County, do hereby certify that the foregoing is a full, true and correct abstract of the title to the *Busy Bee and Republican* lodes and the *Republican* mill site therein described, as the same appears of record in said office, and that there are no deeds or other instruments appearing of record purporting to convey or affect the same except the certificates of location of which the foregoing are true copies.

Witness my hand, etc., as above.

The Abstract Should Show Title in Applicant.

Rule 42. If it show title in several co-owners, all such co-owners should join as applicants. If it show a co-owner without interest in one or more claims of a group, the proceedings are a nullity as to such claims.—32 L. D. 217. If it show that there were co-owners who had been forfeited out for non-per-

formance of annual labor, this is considered equivalent to an abstract showing transfer by deed from them to the applicant. A break in the chain of title behind a relocation made in the usual form to take up abandoned claims may be disregarded. —10 L. O. 119. But the department will take notice of a void sheriff's deed or other break in the title asserted and relied on by the applicant.—21 L. D. 544. Where the names of co-tenants are inadvertently omitted in the application they have been allowed to be supplied and the patent issued to all.—10 L. O. 206; but this is *irregular*.

Where the entire title is not in claimant at the time of application, the entry may stand if he subsequently acquire complete title.—26 L. D. 484, 37 L. D. 715.

When some of the applicants are without interest, they will be permitted to acquire title subsequent to entry.—29 L. D. 208.

O. PROOF OF CITIZENSHIP.

STATE OF COLORADO, }
City and County of *Denver*. } ss.

Carroll Carter, being first duly sworn according to law, deposes and says that he is the applicant for patent for the *Busy Bee and Republican* lode mining claims and the *Republican* mill site, situate in *Gilpin* Mining District, County of *Denver*, State of Colorado; (*) that he is a native born citizen of the United States, born in the County of....., State of....., in the year....., and is now a resident of *Denver*, State of Colorado. CARROLL CARTER.

Subscribed and sworn to before me this 16th day of April, A. D. 1916.

My commission expires March 4, 1918. ALICE HATCH,

(SEAL) *Notary Public.*

When the applicant is not a native citizen the form after the (*) will proceed:

That he is a naturalized citizen of the United States; took out his final naturalization papers in the *Circuit Court* of the United States at *Denver*, Colorado, on the first day of *May*, 1900, and is now a resident of *Denver*, State of Colorado.

If the applicant has not taken out his final papers, it will show, as required by *Rule* 68, when, where, and in what Court he took out his first papers:

That he declared his intention of becoming a citizen of the United States in the *Circuit Court of the United States, at Denver, Colorado,* on the *first* day of *May,* 1899, and is now a resident of *Cheyenne,* State of *Wyoming.*

If the applicant claims under his father's naturalization, it will proceed:

That he is a naturalized citizen of the *United States,* born in the *Republic of Peru,* and that he came to the United States, a minor, under the age of 21 years, and has ever since resided in the United States, and that his father took out his final papers and became a naturalized citizen of the United States during the minority of affiant, whereby affiant became a naturalized citizen under the terms of section 2172 of the Revised Statutes of the United States, and is now a resident of *Aspen,* County of *Pitkin,* State of Colorado.

Serving in the army or navy does not complete citizenship of itself. Soldiers must comply with Sec. 2166 and sailors with Sec. 2174 of the Revised Statutes, or 28 Stat. L., p. 124.

Where there are several applicants each makes his own affidavit of citizenship.

Affidavit, Where Made.

By Act of April 26, 1882, the affidavit of citizenship, where the applicant resides outside of the land district, may be made anywhere in the United States, before any notary or Clerk of Court of Record where the applicant may reside or happen to be found.

Proof by Two Witnesses.

When the affidavit of the applicant can not be procured the land office will allow proof of his citizenship by the affidavits of two disinterested witnesses.—Rule 70.

Citizenship of Corporation.

A corporation must file a copy of its charter or articles of association, certified to by the Secretary of State of the State within which it is operating, whether it be a domestic corporation or a corporation of some other State doing business in that State.—Rule 66, 27 L. D. 351.

Or it may file a "Certificate of Incorporation" and the Land Office will not pass on the point that it is not by its articles a corporation which could lawfully take title to mineral lands.—20 L. D. 116, 22 L. D. 83.

In an adverse claim suit a corporation need not prove the citizenship of its stockholders.—*Duncan v. Eagle Rock Co.*, 48 Colo. 569, 139 Am. St. Rep. 288, 111 P. 588.

Entry secured by fraudulently suppressing the fact that it was for the benefit of an alien corporation will be canceled and purchase price will not be refunded.—20 L. D. 379.

Proof of Non-Abandonment.

By circular of the General Land Office of March 24, 1887, 8 L. D. 505, it was ruled that the register should require upon each application satisfactory proof of compliance with the annual labor law; but since the revision of 1901 such proof is no longer required and the question is left by the department to be settled by adverse claimants in the courts.—Rule 55, 29 L. D. 302, 401, 31 *Id.* 69. But a delay to make entry until beyond the end of the calendar year after publication, held fatal to the entry, where relocation for failure to do annual labor is alleged by protest.—31 L. D. 69.

P. PUBLISHER'S CONTRACT.

I, the undersigned, publisher and proprietor of the *Weekly Register Call*, a weekly newspaper published in *Central City, Gilpin* County, State of Colorado, hereby agree to publish a notice dated U. S. Land Office, *Denver*, Colo., *April* 15, 1916, required by Act of Congress, approved May 10th, 1872, of the intention of *Carroll Carter* to apply for a patent for *his* claim on the *Busy Bee and Republican* Lode and Mill Site, situate in *Wisconsin* Mining District, County of *Gilpin*, State aforesaid, and to hold the said *Carroll Carter* alone responsible for the amount of our bill for publishing the same.

And it is hereby expressly stipulated and agreed that no claim shall be made against the government of the United States, or its officers or agents, for such publication.

Witness my hand this 16th day of *April*, A. D. 1916.

G. M. LAIRD, Publisher.

In What Newspaper.

The notice must be published in a newspaper to be by the Register designated as published nearest to the claim.—R. S., Sec. 2325, 14 L. D. 138. When there are two or more in the nearest town, either may be designated.—2 L. D. 758, 40 L. D. 190; *Cameron v. Seaman,* 13 M. R. 584, 69 N. Y. 396, 25 Am. Rep. 212. The practice of the Register, where two or more local papers in the same town are published, is to designate that one which the attorney may suggest. The distance is to be calculated not by an air line, but by the most usually traveled route. The language of the act allows much discretion in the designation of the newspaper.—17 L. D. 560, 26 *Id.* 145, 34 *Id.* 281. But this discretionary power is subject to review by the department.—32 L. D. 359, 611.

The notice must be continued in the same paper and can not be shifted from the daily to the weekly edition.—3 L. O. 18.

What Constitutes a Newspaper.

It must be a reputable newspaper of general circulation.—2 L. D. 205, 758. The Register has a discretion in deciding what constitutes such a newspaper.—10 L. D. 655, 26 *Id.* 145.

Q. PUBLICATION NOTICE.

This is verbatim the same as "K" and amounts to a fifth copy of "K," except that it is not signed by the applicant nor by the witnesses but is forwarded in blank to the land office, where it receives the application number, is signed by the Register and returned by him to the attorney for claimant or direct to the printer.

It usually contains at the foot the dates of the first and last publications; but erroneous statement of last date will not excuse failure to file adverse within statutory period.—25 L. D. 550.

Manner and Period of Publication.

The notice "Q" must be published for 61 days in a daily, or nine consecutive times in a weekly paper.—29 L. D. 230, Rule

45; and while the notice is going through its newspaper publication, it also stands posted on the claim, and tacked to the bulletin of the land office. Each of these methods of publication is mandatory and essential. See p. 574.

Publication once each week in a tri-weekly paper is not sufficient.—41 L. D. 369.

Z. NON-MINERAL AFFIDAVIT.

The non-mineral character of the mill site must be shown by the affidavit of two or more disinterested persons.—Rule 65. For form of affidavit see p. 581.

AA. PROOF OF SITE USED FOR MINING OR MILLING PURPOSES.

Proof that the mill site is used for mining or milling purposes is specially required by the department.—32 L. D. 128, 34 L. D. 325. Proof is made by the affidavit of the claimant and two disinterested witnesses. For form see p. 581. As to what is sufficient use see p. 297.

First Set or "Application" Papers.

The above mentioned papers, constituting the following list, to-wit:

F.—The final plat—one copy.

H.—The approved field notes.

K.—The copy intended for posting in land office.

K.—Second copy with "L" proof of posting attached.

M.—Application for patent.

N.—Abstract of title.

O.—Proof of citizenship.

P.—Publisher's agreement.

Q.—Publication notice.

Z.—Non-mineral affidavit.

AA.—Proof of use—which complete the first set of papers commonly called the "application papers," are all forwarded at one time by the attorney to the local land office.

Upon receipt of the application papers, accompanied by the filing fee of ten dollars, the Register gives the papers an appli-

cation number, makes a record of the application in the nature of an index, attests the posting of notice "K" in his office, affixing the date, and returns to the attorney for claimant the notice for publication "Q" headed with the application number, or sends it direct to the proper paper for publication. The return of the publication notice to the attorney or paper is an implied approval of the publisher's contract and a sufficient designation of that paper.

RECAPITULATION.

It may be convenient to review the proceedings at this point.

The papers A to I, inclusive, have performed their office.

A, the request for survey; C, the preliminary plat; D, the field notes, and F, the final plat, remain with the surveyor general.

B, the order for survey, remains in the hands of the surveyor, being his voucher against the applicant for the work done under it.

E, G and I are mere certificates indorsed on other papers.

The transcript H (the approved field notes), has been attached to the application M, and both mailed to the local land office.

One copy of the plat F has been forwarded by the Surveyor General to the local land office to be kept on file; one copy has been posted on the lode claim, and one on the mill site, and one copy forwarded to the local land office as one of the application papers.

One of the notices K has been posted on the lode claim, and one on the mill site; one has been attached to the proof of posting; one has been posted in the land office, and one, Q, remains to be published or is being published.

L, the proof of posting; M, the application; P, the publisher's agreement, and Z and AA, the mill site proofs, have been filed in the land office.

N, the abstract has been filed and O, the proof of citizenship, if not yet filed may be filed at any time pending the publication.

The Second Set or "Final Entry" Papers Which Remain to be filed after the publication is complete, consist of:

R.—Proof of continuous posting.

S.—Proof of publication.

T.—Proof of sums paid.

U.—Application to purchase.

When the period of publication is complete, proofs of the notice having remained on the claim and of the publication are made as follows:

R. PROOF THAT PLAT AND NOTICE REMAINED POSTED ON CLAIM DURING TIME OF PUBLICATION.

STATE OF COLORADO, }
City and County of *Denver*. } ss.

Carroll Carter, being first duly sworn according to law, deposes and says, that he is the claimant of the *Busy Bee and Republican* lodes, and mill site, *Wisconsin* Mining District, *Gilpin* County, State of Colorado, official plats of which premises together with notices of his intention to apply for a patent therefor were posted thereon, on the 14th day of *April*, A. D. 1916, as fully set forth and described in the affidavit of *John C. Clark* and *B. F. Pinson*, dated the 16th day of *April*, 1916, which affidavit was duly filed in the office of the Register, at *Denver*, in this State; and that the plats and notices so mentioned and described, remained continuously and conspicuously posted upon said mining claim and upon said mill site from the 14th day of *April*, A. D. 1916, until and including the 19th day of *June*, A. D. 1916, including the sixty days' period during which notice of said application for patent was published in the newspaper. CARROLL CARTER.

Subscribed and sworn to before me this 20th day of *June*, A. D. 1916, and I hereby certify that the foregoing affidavit was read to the said *Carroll Carter*, previous to his name being subscribed thereto.

My commission expires March 4, 1918. ALICE HATCH,
(SEAL) *Notary Public.*

This affidavit of continuous posting the claimant may make from information derived from hearsay.—9 L. D. 503.

When the posted notice has been destroyed the department requires a new posting and a repetition of the publication *de novo*. 37 L. D. 365. *Batterton v. Douglas Co.*, 20 Ida. 763, 38 L. R. A. (N. S.) 1121, 120 P. 827.

S. CERTIFICATE OF PUBLICATION.

(Copy of publication notice cut from paper and pasted here.)

I, *G. M. Laird,* do certify that I am Publisher of the *Weekly Register Call,* a weekly newspaper published in *Central City,* in the County of *Gilpin,* and State of Colorado, and that the annexed notice was published in said paper once each and every week for nine consecutive weeks, the first publication being on the 15th day of *April,* A. D. 1916, and the last publication being on the 17th day of *June,* A. D. 1916. G. M. LAIRD.

The publisher's receipted bill is commonly attached to this blank.

Subscribed and sworn to before me, this 20th day of *June,* A. D. 1916.

My commission expires March 3, 1920.

(SEAL) JAMES M. SERIGHT,
Notary Public.

Together with these proofs of publication and posting, the claimant forwards, under one of the instructions of the department, the following:

T. PROOF OF SUMS PAID.

STATE OF COLORADO, }
City and County of *Denver.* } ss.

Carroll Carter, having been first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years; that he is the applicant for patent to the *Busy Bee and Republican* lodes and the *Republican* mill site, in *Wisconsin* Mining District, *Gilpin* County, Colorado; that in the prosecution of such application he has paid the following sums of money, viz.:

For office work in the Surveyor General's office	$ 70
To *R. L. Chase,* Mineral Surveyor, for surveying and platting	125
To Register and Receiver, for filing application in Land Office	10
To the *Weekly Register Call,* for publishing notice of application	20
To the Receiver of the local Land Office, for land	70
	$265

CARROLL CARTER.

Subscribed and sworn to before me this 20th day of *June,* A. D. 1916.

My commission expires March 4, 1918. ALICE HATCH,
Notary Public.

(SEAL)

These are the official costs only; they do not include attorney's fees, notary's charges, nor cost of abstract. The total

expense of patenting one lode, without mill site, varies from $250 to $300.

The filing of this paper, T, completes the prerequisites of entry and payment except the formal application to purchase, U, and the register's proofs, V and W.

U. APPLICATION TO PURCHASE.

To the Register and Receiver United States Land Office, at *Denver*, Colorado:

The undersigned, claimant under the provisions of the Revised Statutes of the United States, Chapter VI, Title 32, and legislation supplemental thereto, hereby applies to purchase that *mining claim* known as the *Busy Bee* and *Republican* lodes and the *Republican* mill site, located in Sections 24 and 25, Township No. 2 S., Range No. 74, west of the sixth principal meridian, designated as lot No. 21000 A and B, said lot No. 21000 A extending 1,500 feet in length along each of said lodes, but *expressly excepting and excluding* from this application all that portion of the ground embraced in mining claim or survey designated as lot No. 19999, *Climax* lode, and also all that portion of any vein or lode, the top or apex of which lies inside of said excluded ground, said lode mining claim embracing 8.058 acres and said mill site embracing 5 acres in the *Wisconsin* Mining District, in the County of *Gilpin*, and State of Colorado, as shown by the survey thereof, and hereby agrees to pay therefor seventy dollars, being the legal price thereof. CARROLL CARTER.

Dated *Denver, June* 20, 1916.

I, *Mary Wolf Dargin*, Register of the land office at *Denver*, Colorado, do hereby certify that the aforesaid mining claim or lot No. 21000 A and B as applied for above, is subject to entry by the above named applicant; the area of said lode mining claim being 8.058 acres and of said mill site five acres, and the legal price thereof seventy dollars.

MARY WOLF DARGIN,
June 20, 1916. Register.

U does not need to be verified.

Excluded Areas.

The notice and the application must show what areas are excluded and if the entry be of any such excluded areas a republication and posting will be ordered.—22 L. D. 711, 28 Id. 436.

Entry may embrace land excluded from application, but which, on adverse proceedings, was awarded to the applicant. —29 L. D. 71. May be amended to include a tract at first

excluded on account of defective title.—29 Id. 287. Will not be allowed for land embraced in a prior subsisting entry.—29 *Id.* 62.

Entry—Cancellation—Relinquishment.

Entry canceled without notice must be reinstated.—23 L. D. 113, 31 Id. 51. Cancellation does not subject claim to relocation.—23 Id. 113, but republication and posting are required. —29 Id. 470, 31 Id. 37. Reinstatement will not be made when entryman has filed adverse against subsequent application.—26 Id. 608. Entry may stand on proper proof where title is subsequently acquired.—29 Id. 208. Entry allowed by mistake pending adverse will be canceled.—30 Id. 298. A relinquishment during publication and before adverse claim is filed runs to the government though in terms made for the benefit of another claimant and the ground relinquished can not thereafter be made the basis of an adverse.—27 Id. 369.

The Land Office has the right to cancel mineral entries for non-compliance with Statute or rule, although no adverse claim has been filed.—*Mineral Farm Co. v. Barrick,* 33 Colo. 410, 80 P. 1055.

The rejection of an application for patent or the cancellation of his receiver's receipt by the Land Office does not destroy the applicant's original title by location.—*Peoria Co. v. Turner,* 20 Colo. App. 474, 79 P. 915; *Rebecca Co. v. Bryant,* 31 Colo. 119, 102 Am. St. Rep. 17, 22 M. R. 538, 71 P. 1110.

Repayment.

By A. C. March 26, 1908, provision is made for the repayment of purchase price when an application or entry is rejected, and applicant has not been guilty of any fraud.—36 L. D. 388.

Register's Proof Completes Application.

Upon receipt of the final entry papers (R—U, Z and AA) accompanied by the purchase money (all other papers being

regular) the Register makes his certificate that the notice "K" remained posted on his bulletin during the period that its duplicates were being posted on the claim and published, and makes his final certificate of entry.

V. REGISTER'S CERTIFICATE OF POSTING NOTICE FOR SIXTY DAYS.

[*Attached to Bulletin copy of K.*]

UNITED STATES LAND OFFICE,
At *Denver*, Colorado, *June* 21, 1916.

I hereby certify that the official plat of the *Busy Bee* and *Republican* lodes and *Republican* mill site, designated by the Surveyor General as lot No. 21000 A and B was filed in this office on the 17th day of *April*, A. D. 1916, and that a notice, of which the attached is a copy, of the intention of *Carroll Carter* to apply for a patent for the mining claim or premises embraced by said plat, and described in the field notes of survey thereof filed in said application, was posted conspicuously in this office on the 17th day of *April*, 1916, and remained so posted until the 20th day of *June*, 1916, being the full period of sixty consecutive days during the period of publication as required by law; and that said plat remained in this office during that time subject to examination and that no adverse claim thereto has been filed.

MARY WOLF DARGIN,
Register.

It is important that this bulletin notice, "K," should have been properly posted. The Land Office holds that it is essential that the three notices, to-wit: By newspaper, by posting and by the bulletin should be concurrent, and in a case where the bulletin was not posted till the third day of advertisement they allowed an adverse on the 63rd day, holding that the double and contemporaneous publication was not until such day complete. The bulletin must be posted 60 days, and the *newspaper notice does not begin to run* until the bulletin is posted.—5 L. D. 510, 17 L. D. 282. If any one of the three notices is insufficient they are all rendered valueless.—29 L. D. 467.

W. REGISTER'S FINAL CERTIFICATE OF ENTRY.

Mineral Entry No. 09999.
Lot No. 21000 A and B.

UNITED STATES LAND OFFICE,
At *Denver*, Colorado, *June* 21, 1916.

It is hereby certified that in pursuance of the provisions of the Revised Statutes of the United States, Chapter VI, Title 32, and legislation sup-

plemental thereto, *Carroll Carter*, whose postoffice address is *Denver, Colorado*, on this day purchased that mining claim known as the *Busy Bee* and *Republican* lodes and *Republican* mill site, in sections 24 and 25, in township No. 2 S., Range No. 74 W. of the sixth principal meridian, designated as lot No. 21000 A and B, said lot No. 21000 A and B extending 1,500 feet in length along said *Busy Bee* and *Republican* vein or lode, expressly excepting and excluding from said purchase all that portion of the ground embraced in mining claim or survey designated as lot No. 19999, *Climax* lode; and also all that portion of any vein or lode, the top or apex of which lies inside of said excluded ground; said lode mining claims as entered, embracing 8.058 acres and said mill site five acres, in the *Wisconsin* Mining District in the County of *Gilpin*, and State of Colorado, as shown by the plat and field notes of survey thereof, for which the said party first above named this day made payment to the receiver in full, amounting to the sum of seventy dollars.

Now, therefore, be it known that upon presentation of this certificate to the Commissioner of the General Land Office, together with the plat and field notes of survey of said claim and the proofs required by law, a patent shall issue thereupon to the said *Carroll Carter* if all be found regular.

MARY WOLF DARGIN,
Register.

Receiver's Receipt.

The above certificate, generally known as the "Receiver's Receipt," was under former practice signed by the Receiver, but is now signed by the Register, who issues it in duplicate and files the *original* with the papers, and delivers or sends the *duplicate* to the claimant, and all the preliminary proceedings are now complete. This receiver's receipt or certificate of entry should be kept by the claimant until notice from the local Land Office that patent has arrived at such local Land Office, as its surrender is required before the patent is delivered. If mislaid, proof of loss must be made.

X. AFFIDAVIT OF LOST "RECEIVER'S RECEIPT."

STATE OF COLORADO, }
City and County of *Denver*. } ss.

In the *Denver* Land District, Colorado.

Before me, the subscriber, register of said land office, personally appeared *John Best*, who, being duly sworn, saith that he is the (*) applicant for a patent on the *Brelau* lode mining claim survey lot No. 18000 in *Wisconsin* Mining District, County of *Gilpin*, State of

Colorado, and the same person who as such applicant made entry of said survey lot in the said land office on or about the *first* day of *June*, A. D. 1915. That on the date of said entry he received the duplicate register's final certificate of entry therefor. That said duplicate certificate is lost or mislaid. That deponent has made diligent search among his papers and can not find the same, and can not therefore surrender the same. That he never assigned or purported to assign said duplicate certificate and still remains the owner and in possession of the land therein described and is the party entitled to receive the patent therefor.(*) Wherefore affiant asks that the patent to said survey lot be delivered to him without the surrender of said certificate of entry upon this his affidavit of loss. JOHN BEST.

Sworn and subscribed to before me this *eighth* day of *June*, A. D. 1916.
My commission expires March 4, 1918. ALICE HATCH,
Notary Public.

If the title has been transferred insert between the (*) (*)

Owner by purchase of the *Brelau* lode, etc. (description), That he purchased the same since the same was entered for patent by deed from the party who made the entry. That he never received the duplicate register's final certificate of entry from his vendor, and does not know where the same can be found. That he has made diligent inquiry of the attorney and surveyor employed in the application for patent to said lode, who declare that they never had the same in their possession, and that the whereabouts of affiant's vendor are unknown to affiant. Wherefore, etc.

After Entry.

All proceedings after entry are ministerial. The papers in the local Land Office, except the copy of plat F, furnished by the Surveyor General, are forwarded to the General Land Office at Washington and the patent issues in due course usually arriving within one year, the department being behind in its office work; but this is upon the supposition that all the preliminary steps have been regular, and that the land was in fact open to entry—if material errors or defects are discovered after the Receiver's receipt issues, it may be, and often is, recalled and canceled, and if land entered as agricultural is shown to be mineral at any time before patent issues, the same result follows.—7 L. O. 23.

Corrections and Additional Proofs.

The entire series of papers are reviewed at Washington and if irregularities, such as errors in survey, insufficient proof of improvements, errors in affidavits, etc., are discovered, the local Land Office is notified from the General Land Office, and (unless the mistake is a fatal one) the claimant or his attorney is, by letter from the local Land Office, notified to remedy the defect by further affidavit or certificate, as the case may be.

Government Price $5 Per Acre.

The application papers (p. 568) are accompanied by the money to be paid on the land, being $5 for each acre or fractional part of an acre of the surface ground. The extreme limit of claim being 1,500 feet long by 600 feet broad, such claim contains 20 and 66-100 acres; the fractional acre being paid for as one acre, makes the claim equivalent to 21 acres. The amount paid will therefore vary between $5 and $105 for a single lode location with no mill site. The price of placer ground is $2.50, and of mill site $5 per acre, or fraction of an acre.

Acreage of Lode Claims.

In computing this acreage all interfering surveys which have been deducted, are excluded. The payment is based on the amount of claimed surface ground covered by the survey and not excluded in favor of prior applications.

Claim	1500	x	600	feet	contains	20.66 acres.
"	1500	x	300	"	"	10.33 "
"	1500	x	150	"	"	5.16 "
"	3000	x	50	"	"	3.44 "
"	1400	x	50	"	"	1.60 "
"	1600	x	50	"	"	1.83 "

Affidavits—Where Made.

All affidavits made in support of the application must be made within the land district.—R. S. Sec. 2335, 34 L. D. 314, 35 Id. 455, 42 L. D. 526. A possible exception to this is the

publisher's affidavit (S) where the paper "nearest the claim" happens to be a newspaper in another land district.—38 L. D. 131. Another exception is the affidavit of citizenship.—See page 565.

That the affidavit of posting was made outside the land district will not render the entry void.—*El Paso Co. v. McKnight*, 233 U. S. 250, L. R. A. 1915A, 1113, 34 Sup. Ct. Rep. 498, 58 L. Ed. 943.

Before What Officer.

They may be made before a disinterested notary public or any officer authorized to administer oaths. Among such officers are the Register and Receiver of the proper district. Where allowed outside the district they should be taken before a notary or the Clerk of a Court of Record. In all cases the official seal should be attached.—Rule 69.

A notary who has been retained as counsel for an interested party can not act.—42 L. D. 526.

It had been ruled that any officer, as for instance the Clerk of the U. S. Court, whose jurisdiction extends over the territory of the land district, may administer the oath anywhere within his jurisdiction.—3 L. O. 195. But it was later held that such officer must be within the land district.—34 L. D. 314.

Where the Application Is Joint, Any One Co-Owner May make all the affidavits required, on behalf of his co-owners as well as on his own behalf, except the affidavit of citizenship.—See page 564.

When a claim is owned in common, it is sometimes convenient to have a quit-claim executed by the others to one of their number, placing the title for the time being, in his name, the grantors securing themselves by title bond or otherwise.

Application by Agent.

Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought

to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: * * * —*A. C. Jan. 22, 1880. Amendment to Sec. 2325.*

It does not seem that under the above act a resident owner can apply at all by agent—unless at least temporarily absent. —8 L. D. 223, 35 L. D. 434. And the fact of absence should be recited in the power of attorney. In other words, he can not delegate the power while he is present, by mere caprice or desire to avoid personal attention to the matter.

Verification of application by agent where claimant is within the district makes the entry invalid.—41 L. D. 614, 42 L. D. 481.

Where an application is by agency there must be a written power of attorney, the original of which is filed in the Land Office.

Y. FORM OF POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, That I, *John Glenn*, of *Baltimore*, State of *Maryland*, a citizen of the United States, do hereby constitute and appoint *J. W. B. Smith*, of *Idaho Springs*, County of *Clear Creek*, State of *Colorado*, my attorney-in-fact, for me and in my name, to make application for patent of the United States, in the proper land office, upon the *Dragon* lode mining claim, 1,500 feet in length by 150 feet in width, situate on *Republican Mountain* in *Griffith* Mining District, County of *Clear Creek*, State of *Colorado*, and to make or cause to be made, any and all surveys, relocations, affidavits, and all necessary papers which may be required in the prosecution of such application, or to perfect or protect the title thereto, and to do all acts and things in and about the premises which I myself, if present, could do, until patent is finally delivered. Also in case of adverse claim, I authorize him to employ counsel and take all measures necessary to defend against said adverse claim or suit in support thereof, either in the land office or in judicial proceedings, and in such judicial proceedings, to execute any bonds or other papers, and verify all proceedings, to and including appeal or writ of error.

Witness my hand and seal this *third* day of *February*, A. D. 1916.

JOHN GLENN. (SEAL)

Acknowledge according to form on p. 333.

The mineral surveyor can not accept such power nor act directly or indirectly as agent.—Rule 93.

In Each Affidavit Signed by Agent Should Be Inserted, by way of precaution, the following clause:

Affiant further saith that the said claimant is not a resident in the land district in which said claim is situate, but resides at *Tallahassee*, State of *Florida*, and that affiant is the duly authorized agent of said claimant, and is conversant with the facts sought to be established by said affidavit.

Where a Corporation Applies All Papers are Signed by the president, or other officer designated as stated in the next paragraph; but more usually (and advisably), it executes the form Y to some resident person or agent.—See page 579.

Where it does not adopt the latter plan the Land Office practice requires proof that the officer purporting to act for the company was authorized to make the application. Such proof may consist of a copy of the resolution of the board of directors instructing some designated officer to apply for patent to the claim or claims mentioned, certified by the secretary under the corporate seal.

Mill Site Application.

Where a mill site is applied for separately it must be upon land occupied by mill or reduction works (page 298). In such case the forms herein given are sufficient, changing the word "lode" to "mill site," and adding the two forms next following. The price per acre is also the same (page 294). The applications for mill sites alone are rare, they being usually applied for in connection with a lode.

But the Land Office has ruled that the owner of a lode already gone to patent, who then held or afterwards secured title to a mill site which he uses as appurtenant to his mine, may apply for a patent to the mill site later by independent application, upon showing the use of the mill site in connection with the lode, the same as if he had originally joined both in one application.—22 L. D. 496.

Z. NON-MINERAL AFFIDAVIT.

STATE OF COLORADO, }
County of *Gilpin*. } ss.

Clarence Jarbeau and *Benj. C. Catren, Jr.*, each of lawful age and residents of *Georgetown*, in said County, being first duly sworn, each for himself, and not one for the other, saith: That he is a citizen of the United States; that he is well acquainted with the *Republican* mill site claim of *Carroll Carter*, situate in *Wisconsin* Mining District in *Gilpin* County, Colorado, upon which said *Carroll Carter* has applied for patent of the United States, and knows the character of said described land, having frequently been actually upon the same; that his knowledge of the land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any placer, cement, or other valuable mineral deposits, or any deposit of coal; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for minerals during any part of the year by any person or persons; that said land is essentially non-mineral land, and that he has no interest whatever in said claim, or in said application for patent.

CLARENCE JARBEAU,
BENJ. C. CATREN, JR.

Verification as in form BB.

The claimant is not required under the rules as amended to file his own affidavit to the same effect.—Rule 65.

Where a mill site is applied for either separately or in connection with a lode a second affidavit substantially according to the following form is required.—13 L. D. 175, 32 L. D. 128, 34 L. D. 325.

AA. PROOF OF MILL SITE USED FOR MINING (OR MILLING) PURPOSES.

STATE OF COLORADO, }
County of *Gilpin*. } ss.

Before me, the subscriber, a notary public in and for said County, personally appeared *Carroll Carter* (claimant), and *Harry Evans* and *James W. Ross* (witnesses), who being duly sworn each for himself and not one for the other, saith that he is a citizen of the United States and said witnesses reside in said County. That he is familiar with the *Republican* mill site, survey lot No. 21000 B. for which the said *Carroll Carter* has applied for patent in the United States land office at *Denver*,

Colorado. That the ground embraced in said survey is used or occupied by said claimant for *mining and milling* purposes, to wit: *As a dump for the Busy Bee and Republican lodes, and contains a fifty-stamp mill and an ore house used in the working of said lodes; also a boarding house used by miners engaged in working said lodes* (etc., as the case may be).

And the said *Harry Evans* and *James W. Ross*, severally say that they have no interest whatever in said mill site or in the application for patent therefor.

CARROLL CARTER,
HARRY EVANS,
JAMES W. ROSS.

Verification as in form BB.

As to contiguity of mill site see page 297.

The improvements must be in the nature of mills, flumes, ditches, or other things incidental to milling or mining. Buildings and roads not used for such purposes can not be considered; otherwise if they are so used.—See page 299.

It is generally advisable to apply for a mill site in connection with a lode claim; and in applying for a lode patent a mill site can be included and surface for building purposes readily acquired, at a cost of $50 less than if separate applications are made.—See pages 294, 299.

The lode is always distinguished as survey lot "A"—the mill site by the same number with the addition of "B." The mill site may be in another mining district or in a section different from that containing the lode.

In such application there must be a plat, and notice K posted on both lode and mill site; if not posted on the latter, republication will be required.—25 L. D. 165, 27 *Id.* 373, Rule 63.

The department has ruled that a lode intersected by a mill site or placer may be patented only to the edge of the intersecting claim.—13 L. D. 146, 16 *Id.* 186, 26 *Id.* 675, 28 *Id.* 120; and that such a location is not valid as to ground on the other side of the mill site.—26 L. D. 675. But by a later ruling both parts may be patented if the vein has been discovered on both sides.—31 L. D. 359.

Two mill sites not containing together more than five acres may be included in one application.—2 L. D. 755. It is inti-

mated that on sufficient showing more than one mill site may be patented with a group of claims.—34 L. D. 327. See page 299.

The Land Office distinguishes between a mere water right and a mill site.—5 L. D. 190. The use of a spring is not a mill site occupation.—*Id.*

The rejection of an application for a lode claim carries with it an included application for a mill site.—43 L. D. 548.

Lodes and Placers Distinguished.

Only metalliferous deposits in place are considered lodes under the mining act.—9 L. O. 165. Everything else of a mineral character, *i. e.*, lands containing a mineral substance rendering them of more value for the extraction thereof than for surface purposes, is treated as placer ground. The rulings on this point are cited on pages 260, 261. In addition to the cases there given it has been ruled that limestone for lime kiln purposes may be located as placer ground.—9 L. O. 5; and it can not be located as a lode claim.—23 L. D. 353; *Id.* 395. Mica may be entered as a mining (presumably a placer) claim. —2 L. O. 131. A deposit of brick-clay does not make placer ground.—6 L. D. 761, 31 L. D. 108. Sandstone formation bearing gold, should be located as a lode claim.—38 L. D. 294.

Sedimentary sandstone carrying gold is rock in place upon which a lode claim can be made.—38 L. D. 294.

Iron may be lode or placer according to the nature or form of the deposit, following the same distinction referred to in the asphaltum case cited on page 259.—*Copp. Min. Dec. 214,* Dept. Letter MS. Aug. 31, 1909.

Placer claims require a material subdivision into:

First—Claims located on unsurveyed lands.

Second—Claims located by adopting the governmental subdivisions of lands already surveyed.

Placer Patent on Unsurveyed Lands.

In applying for patent on a placer claim located upon unsurveyed lands the foregoing forms, with obvious alterations, will suffice.

In addition to such forms used for lode applications there must be filed in the land office with the first set of papers, proof that the placer contains no lodes (BB) excepting, of course, such as are especially applied for in the application itself, or excluded therefrom as the property of others, and a certified copy of the Descriptive Report (CC) based on paragraph 60, Land Office Regulations.

BB. PROOF THAT NO KNOWN VEINS EXIST IN PLACER CLAIM.

STATE OF COLORADO, }
County of *Gilpin*. } ss.

John C. Jenkins and *Thomas H. Potter*, each of lawful age, and resident in *Central City*, in the said County, being first duly sworn, each for himself, and not one for the other, saith, that he is a citizen of the United States; that he is well acquainted with the *Keystone* Placer Mining Claim, situate in *Gregory* Mining District, County of *Gilpin*, State of Colorado, claimed by *John Wardell*, applicant for United States patent therefor; that for many years he has resided near to, and is well acquainted with the character of said land, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly in regard thereto, and that there is not, to his knowledge, within the limits thereof, any known vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, upon said claim or any part thereof, and further, that he has no interest whatever in the said placer claim.

JOHN C. JENKINS.
THOMAS H. POTTER.

Subscribed and sworn to before me, this *second* day of *May*, A. D. 1916, and I hereby certify that the foregoing affidavit was read to the above named *John C. Jenkins* and *Thomas H. Potter*, previous to their names being subscribed thereto, and that deponents are reputable persons to whom full faith and credit should be given.

My commission expires March 3, 1920.

(SEAL).

JAMES M. SERIGHT,
Notary Public.

This affidavit must be made by two or more witnesses (Rule 26) and filed in the land office, together with transcript FF, with the first set of papers.

The descriptive report the surveyor makes out without special instructions on receipt of "B," the order for survey, and forwards it, with the field notes of the survey, to the Surveyor General.

CC. THE DESCRIPTIVE REPORT.

Survey No. *20500.

Under paragraph 60, General Mining Circular, approved August 6, 1915, upon the Placer Mining Claim, known as the *Hyena placer*, claimed by *S. G. Shaw*, situate in *Spanish Bar* Mining District, *Clear Creek* County, *Colorado*, embracing *a total area of* 9.468 *acres* in *unsubdivided* township 3 S., range 73 W. of the 6th P. M. Examination made *March* 10, 1916, by Frank A. Maxwell, U. S. Mineral Surveyor.

a. The soil is a black loam, varying from 3 to 6 inches in depth, underlaid with auriferous gravel. The timber consists of a scattering growth of spruce and yellow pine trees, and along the banks of the creek there is a dense growth of small willows.

b. Beaver Creek, a small stream about 10 feet wide, flows in a northeasterly direction through the claim. Approximate average fall, 2 feet per hundred.

c. The workings upon the claim consist of an open cut 90 feet long, 20 feet wide and 10 feet deep in earth and gravel to bed rock. Course N. 50° E. The center of the westerly end bears N. 5° W. 500 feet from corner No. 5. A ditch 475 feet long, 2 feet wide and 18 inches deep, average course N. 53° 15′ E., the head of which bears N. 71° E. 50 feet from corner No. 3. A shaft 3 by 6 feet, 10 feet deep in earth and gravel, bears from corner No. 4, N. 2° W. 200 feet. A shaft, 3 by 7 feet, 15 feet deep in earth and gravel, bears from corner No. 3, N. 19° W. 90 feet. A timbered drift, 3 by 6 feet in the clear, 18 feet long, course N. 28° E., the mouth of which bears from corner No. 1, S. 21° W. 170 feet.

d. This claim is located about three miles in a southeasterly direction from the town of Maysville and one mile west of Clear Creek Junction.

e. The northwest boundary line, 1-2, is common with the southeast side line of the Wetzel lode, unsurveyed. The northeast boundary line, 6-1, is common with the southwest side line of the Silvester lode claim, unsurveyed, and a portion of the southeast boundary line 5-6, is common with the northwest side line of the Cement Creek lode unsurveyed.

The above specified lode claims are in close proximity to and form part of well known systems of lode deposits surrounding this placer on the north, west and east.

f. This claim is well adapted for placer mining purposes. Water has been brought from Beaver Creek to work the lower portion of the claim, and it can be brought from a point in the same creek about one quarter mile above to work the entire claim.

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*If on surveyed lands and conforming to legal subdivisions no survey number is given and no survey is required.

g. The works or expenditures upon this claim, placed thereon by the claimant and his grantors, consist of an open cut 90 feet long, 20 feet wide and 10 feet deep, in earth and gravel to bed rock. Course, N. 50° E. The center of the westerly end bears N. 5° W. 500 feet from corner No. 5. A ditch 475 feet long, 2 feet wide and 18 inches deep, the head of which bears N. 71° E. 50 feet from corner No. 3; average course, N. 53° 15′ E. to the open cut described above. A shaft 3 by 6 feet, 10 feet deep in earth and gravel, bears from corner No. 4, N. 2° W. 200 feet. A shaft 3 by 7 feet, 15 feet deep in earth and gravel, bears from corner No. 3, N. 19° W. 90 feet.

h. There are no salt-licks, salt-springs, mines other than the claimant's workings, nor mill sites upon this claim.

i. This placer is surrounded by unsurveyed lode locations on the north, west and east boundaries as stated herein. Boundary lines 2-3, 3-4 and 4-5 have been located and surveyed in accordance with the configuration of the land, which as near as can be determined, defines the placer bed or deposit.

FRANK A. MAXWELL,
U. S. Mineral Surveyor.

I, *Frank A. Maxwell*, United States Mineral Surveyor, do solemnly swear that in pursuance of an order received from the United States Surveyor General for Colorado, dated November 2, 1916, I have made, under the provisions of paragraph 60, General Mining Circular, approved August 6, 1915, a personal and thorough examination upon the premises of the placer mining claim of *S. G. Shaw*, known as the *Hyena* placer, situate in *Spanish Bar* Mining District, *Clear Creek* County, Colorado, embracing *a total area* of 9.468 *acres in unsubdivided Township No.* 3 S., *Range No.* 73 W. *6th P. M.*, and that my report of such examination, hereto attached, is specific and in detail, and is a full and true statement of the facts upon all the points specified in the paragraph referred to.

FRANK A. MAXWELL.

Subscribed and sworn to by the said *Frank A. Maxwell*, U. S. Mineral Surveyor, before me, a notary public, this 10th day of November, 1916.

My commission expires March 4, 1918. ALICE HATCH,
(SEAL) Notary Public.

This descriptive report must be corroborated by the affidavit of two disinterested witnesses as follows—Rule 60:

DD. CORROBORATIVE REPORT.

STATE OF COLORADO, } ss.
County of *Clear Creek*. }

William Cooper and *James A. Noone*, being first duly sworn, each severally deposes and says that he is personally and well acquainted with the placer mining claim of *S. G. Shaw*, known as the *Hyena* placer, situ-

ate in *Spanish Bar* mining district, *Clear Creek* County, Colorado, embracing a total area of 9.468 acres, in *unsubdivided Township No. 3 S., Range No. 73 W.*, and also with the character of all the land included in said claim, and has been so acquainted for two years last past; that his knowledge of said claim and land is derived from personal observation, and is such as to enable him to testify understandingly with regard thereto; that he has carefully read the foregoing report of *Frank A. Maxwell*, U. S. Mineral Surveyor, and that to his own personal knowledge said report is in all respects true and accurate.

WILLIAM COOPER.
JAMES A. NOONE.

Subscribed and sworn to by the above named persons before me, this 10th day of *November*, 1916.

My commission expires *May* 16, 1920.
[SEAL.]

JOHN TOMAY,
Notary Public.

The descriptive report CC, with its corroborative report DD indorsed or attached, the Surveyor General approves in the following form:

EE. APPROVAL OF DESCRIPTIVE REPORT.

DEPARTMENT OF THE INTERIOR,
Office of U. S. Surveyor General,

Denver, Colorado, *November* 25, 1916.

I, *John B. McGauran*, United States Surveyor General for Colorado, do hereby certify that the foregoing and annexed report of the examination of the placer mining claim of *S. G. Shaw*, known as the *Hyena* placer, made by United States Mineral Surveyor *Frank A. Maxwell*, under paragraph 60, General Mining Circular, approved August 6, 1915; and under my instructions dated *November* 2, 1916, has been carefully examined and conforms in all respects to the requirements of said circular; and said report is hereby approved.

JOHN B. MCGAURAN,
U. S. Surveyor General for Colorado.

After indorsement of such approval, the Surveyor General certifies a

FF. TRANSCRIPT OF DESCRIPTIVE REPORT.

Including its exhibits or indorsements DD and EE, as follows:

GG. CERTIFICATE TO DESCRIPTIVE REPORT.

DEPARTMENT OF THE INTERIOR,
Office of U. S. Surveyor General,
Denver, Colorado, *November* 25, 1916.

I, *John B. McGauran*, U. S. Surveyor General for Colorado, do hereby certify that the annexed is a full, true and correct copy of the report made under paragraph 60, General Mining Circular, approved August 6, 1915, and of the affidavits and approval attached to said report on the placer mining claim of *S. G. Shaw*, known as the *Hyena* placer, situate in *Spanish Bar* mining district, *Clear Creek* County, Colorado, in the Denver land district, as the same appear on file in this office.

JOHN B. MCGAURAN,
U. S. Surveyor General for Colorado.

This transcript so certified, together with the field notes and plats, is sent to the claimant, who delivers all papers to his attorney to enable him to make out the notices "K" which he causes to be posted and published, and proceeds in all further respects the same as on application for lode patent.

Application for Patent on Surveyed Lands.

The language of the Congressional Act as to this class of claims is obscure, but it seems that where a placer deposit is found on surveyed lands, discovery, location and record must be made exactly as in the case of discovery on unsurveyed public domain, except that instead of a description by metes and bounds, the location certificate should describe it as the *northeast quarter of section* 8, *township* 10, *etc.*, using one name for each twenty acres and not claiming more than 160 acres by one record. It is advisable to give it a name as in other cases.

Although already surveyed it should be staked, marking the stakes with the name of the claim and number of the corner to indicate the appropriation, replacing the government stakes if not then found.—See page 269.

When the placer application is for an exact quarter section, or a series of forties or tens recorded and adopted as the *claim*, no order for survey, plat or field notes are required, their office having been fulfilled by the prior government survey already

made and platted with the Surveyor General, and the application may be made in the land office without any proceedings whatever in the Surveyor General's office.

The proof of $500 expenditure in such case should be made by the affidavit of two or more disinterested witnesses acquainted with the claim.—25 L. D. 550; Rule 25.

The descriptive report in such cases is not obligatory.—7 L. D. 390. And the Commissioner of the General Land Office, by letter of October 20, 1900, to the Surveyor General of Colorado, instructed that office that, where legal subdivisions are taken, a descriptive report, though approved by the Surveyor General, would not be official unless specially required by the department.

The circumstances in which such report would be required by the department are uncertain, but when required, would doubtless be ordered through the office of the Surveyor General.

In lieu of the descriptive report certain additional data are required to be given in the application for patent "M."—Rule 60.

If any ground is excepted so that the claim is not an exact conformation to the subdivisions an official survey is required. —6 L. D. 580; in which case the report would doubtless be necessary; but no official survey is required if the excluded ground be patented.—31 L. D. 64.

No survey is required where the entry is part of a lot and describes the claim so that it may be readily identified.—42 L. D. 413.

For regulations governing placer applications see Rules 19-30 and 58-60.

Where a Placer Contains Known Lodes Owned by the Appli-

cant, they are applied for as parcels of the placer application and are especially designated on the survey by their names but without separate numbers and platted each with a width of 50 feet, or with the full width, if so located, and the claimant

elects to survey them for such full width, and to pay the lode price for such full width. If such lodes have never been previously located a formal discovery and record of the same should be made and abstract filed the same as for placer.

In requesting order for survey name the lodes, *i. e.*, insert in form "A" *The Special Delivery Placer, including three known lodes, to wit: The Silence, The Security and The Celerity, etc.*, and send copies of location certificates of each lode.—See page 540.

Where the lode and placer do not touch they can not go in the same application.—5 L. O. 162.

Patenting Known Lode Within Placer Patent.

Although known lodes are distinctly excepted from the placer patent and the department originally recognized this exception (7 L. O. 100) it was later ruled in the case of the *Pike's Peak Lode*, 10 L. D. 200, 14 *Id.* 47, that the land office would not issue patent to the owner of such excepted known lode unless the placer patent had been either judicially set aside to the extent of the ground covered by the surface of the known lode or the placer owner had quitclaimed such surface back to the United States so as to revest the title in the government.

This untenable position of the department was persisted in until the *South Star Lode case*, 20 L. D. 204, was decided, where the whole subject was reviewed and the ruling made that patent may issue to the lode owner "when it had been ascertained by inquiry instituted by the department" that a lode was known to exist at the date of the application for the placer patent, as well as in cases where a judicial decree to the same effect had been rendered. The result of this ruling is that the lode owner may now apply for patent as in any ordinary case after first obtaining from the land office an order to ascertain whether the lode was known to exist before the placer entry.—*Butte Co.*, 21 L. D. 125. No rules have been since published directing how much inquiry should be made,

but doubtless it would be required to give notice to the holder of the placer patent, who would be allowed to appear and contest the petition for the order.—27 L. D. 676. See page 280.

If the application is allowed, the placer claimant, if he contests the fact that there was any valid known lode on the proper date, should file his adverse claim or doubtless he could allow the patent to proceed and still contest, in ejectment brought by either side, the validity of the later lode patent, as in the case of *Iron S. Co. v. Campbell,* 16 M. R. 218, 135 U. S. 286, 10 Sup. Ct. Rep. 765, 34 L. Ed. 155. Instance where patentee of placer was not permitted to subsequently patent a lode within the patented placer.—27 L. D. 661.

As to What Constitutes a Known Lode, the Rulings Are That there must be mineral worth working disclosed at the time of the placer entry.—10 L. D. 156, 13 *Id.* 86. And the general test on this class of points seems to be that the land as a lode claim must have been of greater value than for the agricultural, mill site, placer or other use, under which it was applied for and granted.—12 L. D. 612, 14 *Id.* 54. See page 281.

Necessity to Adverse.

Although not bound as in the case of lode against lode or placer against placer by failure to adverse, the lode claimant is under the practical necessity to file and maintain his adverse, in order to place his rights beyond cavil and secure an express exception of his lode, or a patent under the same proceedings. —See page 283.

Group Claims—"Location" and "Claim."

In the case of the *St. Louis Co. v. Kemp,* a placer had been patented in excess of 160 acres. The Supreme Court sustained the patent, and in support of their decision asserted that a miner's *claim* might consist of several *locations;* that several contiguous locations being purchased by one man became his claim. They say: "Such is the general understanding of

miners and the meaning they attach to the term." Even what seem to us the erroneous impressions of our Court of last resort command respect, and its decisions are none the less law, even though they compel us to accept new meanings to the words of our language. In fact where claims under district rules were limited to 100 feet square or other small dimensions, it has been very common to buy up many such claims and record them as one location. The interpretation was, nevertheless, strictly within the province and range of judicial construction. —104 U. S. 636, 26 L. Ed. 875, 11 M. R. 673, followed by *Tucker v. Masser,* 113 U. S. 203, 5 Sup. Ct. Rep. 420, 28 L. Ed. 979.

Prior to the *Kemp case, supra,* the land office had treated each lode location as a single mining claim and the practice was to allow but one to be applied for in one proceeding. After the *Kemp case,* the department began to allow applications for groups of lodes, permitting any number of full lode claims to be patented as one claim, and requiring only $500 expenditure on the entire group. The only restriction imposed was that the several claims should be contiguous, *i. e.,* should overlap or touch, not merely corner with each other.—33 L. D. 560, 35 L. D. 485.

This manifestly wrong construction was adhered to until the publication of what is now Rule 48 of the regulations requiring $500 on each location or for the group the aggregate of $500 multiplied by the number of locations. In his official letter of June 21, 1898, 27 L. D. 91, the Honorable Secretary considers the whole matter and comes to a correct definition of the term "claim," as being the equivalent of the word "location."

Where several lodes are thus applied for, or where a placer includes lodes, they receive only one survey lot number, but the corners of each are given a separate consecutive numerical designation, beginning with Cor. No. 1 in each case, which must be connected with a government corner or U. S. monument.—Rules 135, 151. The survey and plat should show the boundaries of each location.—5 L. D. 199, 6 *Id.* 808, 29 *Id.* 585.

A group composed of lodes and placers may be patented if contiguous.—29 L. D. 7.

The rejection from entry of one claim of a group is a rejection of the application to that extent only.—32 L. D. 220.

When the value of the common improvement is sufficient for a given group, $500 in improvement must be added, after its location, for each new claim added to the group, and all the claims then share equally in the entire value of the improvement.—36 L. D. 551.

The cost of a mining dredge allowed as a common improvement to a group of placers.—38 L. D. 28.

The value of a common improvement, such as a shaft or tunnel, must be distributed equally to all the claims in the group.—35 L. D. 361, 36 L. D. 100, 551.

Where one claim of a contiguous group is rejected because of insufficient improvements, the remainder of the claims, although not contiguous because of such rejection, may go to patent in the same entry.—40 L. D. 17.

What Constitutes Improvements.

Underground workings, cross-cuts or tunnels (on or off the ground, provided they are held by applicant for its benefit, and are *bona fide* intended to cut it), buildings, roads, flumes, fixed machinery, etc., or the result of any other *bona fide* expenditures, constitute improvements.—Rule 157.

Boarding house, office, bunk house, blacksmith shop and powder house, when shown to be essential to operations.—34 L. D. 556.

Excepting labor which leaves no trace of itself, such as hoisting water, whatever counts for annual labor will generally count for the $500 improvements.—See page 121.

Expenditures for diamond drill holes made in prospecting the claim allowed.—40 L. D. 498, 43 L. D. 79.

Roads and Trails.

The department ruled in 34 L. D. 556 and 37 L. D. 404 that no part of a wagon road was available, but in 43 L. D. 128

those decisions were modified and a road or trail allowed where it directly aided in the conduct of mining operations.

Tunnel Improvements.

Undivided interests in tunnels, etc., held in common with parties who are not applicants, are allowed to count as parcel of the necessary $500 improvements.—40 L. D. 17.

Repairs to tunnel without extending it, do not apply to claims located subsequent to its completion.—42 L. D. 75.

Old Improvements on the Ground May Be Purchased from the rightful owners, and so enure to the benefit of the applicant. The deed conveying them should be a quitclaim of all vendor's interest in the claim under the name by which patent is sought, and of all improvements thereon, etc., and where abandoned property is relocated or jumped, the old improvements do not count without such purchase.—30 L. D. 289, 322. The department in an early circular intimated that they could not even be purchased (Copp, M. L. 259), but it later ruled that the purchaser is entitled to the benefit of all expenditures made by his grantor.—21 L. D. 440. Work done on placer prior to location held to count.—20 *Id.* 455. To the contrary. —36 L. D. 9.

Old abandoned improvements are not available to the relocator where there is no privity between the relocator and the party who did the work.—43 L. D. 152.

Expenditures made by one having no interest at the time will not be accepted.—40 L. D. 498.

What Not Sufficient.

Among improvements can not be counted dwelling houses or other structures, machinery or roadways not associated with mining.—Rule 157.

Successive development, as working up stream from lower placer, held insufficient for upper placer.—32 L. D. 402. No

part of improvements on a group will be credited on an adjoining claim if any of the owners of such claim have no interest in the group.—32 L. D. 595.

The department refused to accept a stamp mill, though upon a claim and used exclusively to work the ore it produced, on the technical ground that treatment of the ore is not a mining but a post-mining expenditure.—35 L. D. 493.

And further holds that a lime kiln on a limestone placer for reducing the limestone to lime could not be counted as part of the $500 expenditure.—37 L. D. 371. We can not see how these rulings can stand under the unqualified words of the statute: "Improvements made upon the claim."—R. S. Sec. 2325. 37 L. D. 371.

The land office has ruled that expenditures on a 20-acre placer will not avail for an amended location enlarging it to a 160-acre claim, the reason for which ruling is not at all obvious.—40 L. D. 135.

Improvements on Other Claims.

Where a deep quarry had been excavated upon one of a group of placer marble claims which would develop and benefit adjoining claims, such improvements were held to avail for improvements on the adjoining benefited claims.—*In re American Onyx Co.*, 42 L. D. 417.

Completed Pending Publication.

It is not essential that the $500 worth of improvements should exist on the ground at the time of the survey. They may be completed at any time during the period of publication.—29 L. D. 491. In such cases the Surveyor General indorses diagram "F" with a certificate not containing the latter part of "G." The surveyor in his field notes describes such improvements as may exist, and adds, in substance: "These improvements are not worth $500." When completed the surveyor sends a special affidavit to the Surveyor General, who files it and forwards his certificate to the applicant. An

extra deposit of $5 is required when this affidavit is made subsequent to the first filing of field notes.

The department holds (overruling previous decisions), that the statutory requirements (R. S. Sec. 2325) as to the Surveyor General's certificate of improvements is directory only, and that it may be made after the expiration of the sixty days' publication.—25 L. D. 550, 26 *Id.* 122.

Where the Applicant Dies Before Entry.

On decease of applicant, where applicant died after entry, the patent issues in the name of the deceased.—2 L. D. 762, 39 L. D. 574. And the latest ruling of the department is to the same effect where the party died before the entry, overruling *Tripp v. Dunphy,* 28 L. D. 14; *In re Graham,* 40 L. D. 128.

Application by Trustee.

Any party applying to make entry as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.—Rule 54. A claim can not be patented for the benefit of a foreign corporation.—10 L. D. 641, 20 *Id.* 379.

Patent to Assigns.

On bringing up abstract to date the land office has issued patents to purchasers from the entry-man. But as the deed carries the patented title this is not necessary; nor is it regular. The land office can not be presumed to follow title after entry, and might by such procedure issue it to a party not entitled in equity to take it.

Under present practice the department disregards all transfer of interests in the claim and issues patent direct to the applicant.—33 L. D. 127, Rule 71. But the deed of the applicant carries the patented title when granted, to the buyer.—*Slothower v. Hunter,* 15 Wyo. 189, 88 P. 36.

Application Without Record Title.

Where the title is old and complicated a party may, without filing abstract supply the same by affidavits under R. S. Sec. 2332, as explained by Land Office Rules 74-77, that he has worked and possessed the claim for the limitation period of seven or other number of years fixed by the local statute.

Application for Part of Claim.

An owner applying for patent on part of his claim including the discovery shaft was held not to have abandoned the other end of his claim in *Miller v. Hamley,* 31 Colo. 495, 74 P. 980.

But where the applying claim was divided into two parcels and under compulsion of a land office ruling the applicant elected to enter but one, it was held that such election was an abandonment of the other parcel.—*Gurney v. Brown,* 32 Colo. 472, 77 P. 357.

Entry may be made of part of a claim containing the discovery, although the applicant does not own the other portion. —39 L. D. 524.

Conflicting Applications.

Where an application is pending or entry has been made, a subsequent application for the same land should not be accepted.—26 L. D. 81, 29 *Id.* 29, 114, 226, 31 *Id.* 59, 32 *Id.* 220; and no adverse need be filed against a subsequent application erroneously accepted.—29 *Id.* 160; *Steel v. Gold Co.,* 15 M. R. 292, 18 Nev. 80, 1 P. 448. An adverse suit by entry-man does not waive rights acquired under the entry.—29 L. D. 114. But the government will, in some instances, take notice of an adverse by prior applicant and stay proceedings.—22 *Id.* 629, 25 *Id.* 263.

The Surveyor General gives to any applicant an approved survey showing the conflicts with prior surveys, but not excluding them as against the survey asked for, and allowing the claimant to proceed as he may or can, to apply for patent for

the entire ground within his exterior lines, although wholly or partly covered by previous patents. It is left to the land office to bar the application so far as it pretends to include ground previously patented or applied for.—See page 171.

Variance Between the Locus and the Record of Claims.

Where no conflict between official surveys is shown by the records but a conflict in fact exists; or, where a conflict is shown by the records when none in fact exists as the claims are staked on the ground, the department will order a hearing to determine the actual *locus* of the claims.—33 L. D. 91, 183. See page 62.

The position of all conflicting claims "must be determined as the claims are defined and established upon the ground," and all errors in the records must give way to such facts.—39 L. D. 546.

Allowing Application to Sleep.

Failure to prosecute application to completion within a reasonable time after termination of proceedings constitutes waiver of rights secured under the application.—29 L. D. 62, 301, 308, 359, 401, 35 *Id.* 27, Rule 56. A delay beyond the end of the calendar year after publication held fatal, where a hostile relocation had been made.—31 L. D. 69, 32 *Id.* 200. An excusable delay must be one caused by adverse proceedings under the mining laws.—34 L. D. 56. Upon an unexcused delay of three years after publication the entry should be canceled.—40 L. D. 542. Where the delay was held excusable by the local officers, the entry should not be canceled upon the protest of a relocator.—39 L. D. 574.

Miscellaneous Rulings on Patent Application.

Where application is begun in the wrong land district proceedings must be *de novo,* after error discovered.—17 L. D. 282.

In the case of the *Alaska Placer*, which was partly in one land district and partly in another, the Secretary ruled that posting on the claim and in the land office, and the newspaper publication must be made in both districts.—34 L. D. 40. This ruling necessitates practically a separate and complete application in each district.

When the land office is closed during a part of the period of sixty days the time of closing should not be counted as part of the advertising period.—1 L. D. 584, Rev. Ed. 572. A claim already patented can not be made the basis of a second application for more surface.—9 L. O. 113.

A co-owner omitted from application can not by subsequent forfeiture proceedings against the applicant, acquire right in himself to make entry.—32 L. D. 93.

A discovery on the dip of a lode whose apex is inside a prior valid location is void, and on protest alleging that fact the department will determine the question.—33 L. D. 142.

ADVERSE CLAIM.

Sixty Days to File.

R. S. Sec. 2325. * * * —If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Eight months after publication allowed in Alaska. See Rule 84 (A), page 513.

Extent—Boundaries—Stays Proceedings.

R. S. Sec. 2326.—Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse

claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

Thirty Days to Bring Suit.

It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

An adverse claim must be made during the period of sixty days publication, which is construed to mean on or before the sixtieth day after the date of first newspaper publication, such date being *excluded* in the calculation.—13 L. D. 286. See page 606.

The proceedings are as follows: The adverse claimant subscribes and verifies his

HH. ADVERSE CLAIM.

United States Land Office at *Denver*, Colorado:

In the matter of the application of *Carroll Carter* for a United States patent to the *Busy Bee* and *Republican* lode mining claims, situate in *Wisconsin* mining district, County of *Gilpin*, State of Colorado.

To the Register and Receiver of the United States Land Office, and to the above named claimant:

WHEREAS, *Carroll Carter* did, on the 17th day of *April*, A. D. 1916, file in the district land office of the United States, at *Denver, Colorado*, a certain plat of a survey of certain lodes together with his application for a United States patent for said lodes, naming and calling the said lodes in said plat and application the *Busy Bee* and *Republican* lodes, situate in *Wisconsin* mining district, County of *Gilpin*, State of Colorado; said survey and plat being designated as mineral survey No. 21000 A, and consisting of 1500 linear feet together with surface ground 150 feet in width, on each of said lodes, and the said *Carroll Carter* did, at the same time and place, give notice that he would apply for a United States patent for the above described lodes and premises in substance as follows:

[*Here attach copy of newspaper publication.*]

AND, WHEREAS, The first publication of said notice of said application appeared in the *Weekly Register Call*, a weekly newspaper published at *Central City*, in said County and State on the 15th day of *April*, A. D. 1916.

NOW, THEREFORE, I, *Charles W. Bishop*, a citizen of the United States over the age of twenty-one years, residing in and my postoffice address being *Denver*, in the County of *Denver*, in said State, do, on this *third* day of *June*, A. D. 1916, enter this, my protest, and adverse claim against the issuing of a patent to the said *Carroll Carter* for his pretended claim upon the so-called *Busy Bee* lode, as set forth in his said plat and field notes as aforesaid, for the following reasons, to-wit:

1. The surface ground and veins or lodes contained therein as set forth and described in the plat and field notes of the said *Carroll Carter*, or a great portion thereof, are not the property of the said applicant, neither is he entitled to hold the same under or by virtue of the local laws, rules and customs of miners in said mining district, the laws of the State of Colorado, or the Statutes of the United States relating to mining claims.

2. Because a great portion of the premises described in said plat and notice of said applicant, and claimed by him as the so-called *Busy Bee* lode, is claimed adversely, and is owned by this protestant, and is in fact a portion of the *Elephant* lode, as will appear by reference to an abstract of title herewith filed, made a part of this protest and marked Exhibit A.

3. Because this protestant (and his grantors) have held, occupied and possessed a great portion of the premises set forth and described by the said *Carroll Carter* in his plat and notice of the so-called *Busy Bee* lode, long prior to the pretended discovery and location of the so-called *Busy Bee* lode; such occupation and possession of this protestant (and his grantors) having been under and by virtue of a full compliance with the local laws, rules and customs of said mining district, and the laws of said State, and of the United States, pertaining to mineral lands.

4. Because this protestant (and his grantors) have held, occupied and possessed all that portion of the so-called *Busy Bee* lode, as represented on the plat of a survey made by *Thomas L. Darby*, United States mineral surveyor, and colored *red*, said plat of said survey being herewith filed, marked Exhibit B, and made a part of this protest, and have held, occupied and possessed the same long prior to the pretended discovery and location of the so-called *Busy Bee* lode. And this protestant is the original discoverer and locator of said *Elephant* lode (or is a *bona fide* purchaser for a valuable consideration, from or through the original discoverer and locator of said *Elephant* lode, by conveyances), as shown on said abstract. See Rule 81.

5. Because a valid discovery, location and record of said *Elephant* lode was made by this protestant (or his grantors), in strict compliance with said local laws, rules and customs, and the laws of the State of Colorado and of the United States, and while the same was vacant mineral land of the United States open to occupation long prior to any pretended discovery or location thereof by said *Carrol Carter* (or his grantors) and

said *Elephant* lode hath been occupied and possessed as aforesaid, ever since its discovery as aforesaid, by this protestant (and his grantors), under and by virtue of such discovery, location and record.

6. Because the discovery shaft of the so-called *Busy Bee* lode was not of the legal depth of ten feet from the lowest part of the rim at the surface, as required by law at the date of the pretended record of the same, and has never been since sunk to that depth. 7, etc., 8, etc.

WHEREFORE, This protestant enters this his protest and adverse claim against the issuance of a patent to the said *Carroll Carter* for his claim upon the so-called *Busy Bee* lode.

CHARLES W. BISHOP.

STATE OF COLORADO, } ss.
City and County of *Denver*. }

On this 3rd day of *June*, A. D. 1916, before me, the subscriber, a Notary Public in and for said county, personally appeared the above named *Charles W. Bishop*, who, being first duly sworn, saith that he is the adverse claimant named in the foregoing protest and adverse claim above subscribed by him. That he has read the same and knows the contents thereof; that the same is true in substance and in fact; and that the said adverse claim is made in good faith and to protect his better and prior title.

CHARLES W. BISHOP.

Sworn and subscribed before me, this 3rd day of *June*, A. D. 1916.
My commission expires March 4, 1918.
[SEAL.] ALICE HATCH,
Notary Public.

To the above reasons others may be added where specific facts are known going to the invalidity of the claim sought to be patented, but in every case allege that the claims conflict and that the adverse claimant is owner of the conflicting area and veins, as in paragraph No. 2 of the above form. The first five paragraphs constitute a good statement of an adverse right, according to the various land office rulings and others are added only as precautionary.

Exhibit "A" Is an Abstract of Title Certified as in Form

"N" and should contain a certified copy of the location certificate. But failure to file the abstract within the period of publication (15 L. D. 45) as well as failure to furnish the certified copy, have been held not fatal.—14 L. O. 237.

Exhibit "B" Is a Plat Made by a U. S. Mineral Surveyor, showing the interference of the two claims certified as follows:

I hereby certify that the above diagram correctly shows the Elephant lode in its entirety, its relative situation or position to the *Busy Bee* lode and the extent of the conflict claimed to exist between said *Busy Bee* lode and said Elephant lode as actually surveyed by me.

THOMAS L. DARBY,
U. S. Mineral Surveyor.

When it is impossible to procure an actual survey, as of a snow-bound claim, an adverse claim showing the nature, extent and boundaries of the conflict, stating the reasons why the claim could not be reached for survey, will be sufficient.—1 L. D. 592, Rev. Ed. 582; *Hoffman v. Beecher*, 12 Mont. 489, 31 P. 92, 17 M. R. 503. The plat need not be made by a U. S. surveyor.—27 L. D. 358, 29 *Id.* 460; *Anchor v. Howe*, 50 F. 366.

No plat required where claimant and adverse claimant hold by legal subdivisions.—Rule 82.

Improvements.

The amount of improvements on the adversing claim is immaterial, and though formerly required, need not, under the present rules, be shown, or their value stated.—Rule 82.

Separate Adverse Claims.

Where there are several *applications* to be adversed by a single lode, a separate adverse claim with its plat and abstract must be filed in each case. Where the adverse claimant has several lodes with which he intends to adverse a single application, the practice is to combine them in a single adverse claim.

Where and By Whom Verified.

An adverse claim is usually verified by the adverse claimant or one of the adverse claimants and within the land district.

But by the Act of April 26, 1882 *(post* p. 647), it may be verified by the adverse claimant beyond the land district, or by an agent or attorney in fact cognizant of the facts stated,

who must swear to his agency and furnish proof thereof.—Rules 78, 79. Such agent must make his verification in the land district.—Rule 80; 34 L. D. 314. A corporation verifies either by its executive officer (president) or its agent thereto authorized. It may verify outside of the land district at its principal place of business.—42 L. D. 99. And if the adverse claimant is a non-resident or absent from the district and verifies it personally he may make such verification wherever he may be, before the clerk of any Court of record or a notary public, anywhere within the United States.

In cases of emergency it is a legitimate expedient to have the intending adverse claimant convey to a third party within the district, who then makes and verifies the adverse claim precisely as if he were the real, as he becomes in fact the legal, owner of the adversing claim. But since the act allowing verification by the adverse claimant beyond the district, or the filing by an agent, this course need seldom be resorted to.

Form of Adverse and Verification by Agent.

Proceed as in form "HH" to the last paragraph and insert:

Wherefore this protestant, by *Charles T. Limberg*, his duly authorized agent and attorney in fact, who is personally cognizant of the facts herein stated, enters this his protest and adverse claim against the issuance of a patent to the said *Carroll Carter* for his claim upon the so-called *Busy Bee* lode.

CHARLES W. BISHOP,
By *Charles T. Limberg*,
His agent and attorney in fact.

STATE OF COLORADO, }
City and County of *Denver*. } ss.

On this 3rd day of June, A. D. 1916, before me, the subscriber, a Notary Public in and for said City and County, personally appeared the above named *Charles T. Limberg*, who, being first duly sworn, saith that he is the duly authorized agent and attorney in fact of the above named *Charles W. Bishop*, adverse claimant named in the foregoing protest and adverse claim above subscribed by affiant as will further appear by his power of attorney hereto attached marked Exhibit C; that affiant has read the foregoing protest and adverse claim, and is cognizant of the facts therein stated, and that the same is true in substance and in

fact, and is made in good faith to protect the prior and better title of his said principal.

CHARLES T. LIMBERG.

Sworn and subscribed before me this 3rd day of *June*, A. D. 1916.
My commission expires March 4, 1918.
[SEAL.] ALICE HATCH,
Notary Public.

By Co-Owner.

A single co-owner may make and verify the adverse claim *"on behalf of himself and his co-owners,"* which phrase should, in the form "HH," follow the name of the protestant whenever it occurs or where the context requires it, when an adverse is so made.

And it is held that one co-owner may adverse although another co-owner refuse to join him.

And one co-owner can not withdraw his adverse so as to prejudice another who has joined with him.

Against Co-Tenant.

Where one or more co-tenants apply for patent, omitting the name of one or more of their associates, the title received enures to the benefit of all the co-owners.—*Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192, 37 L. Ed. 1189, 17 M. R. 683; *Brundy v. Mayfield*, 15 Mont. 201, 38 P. 1067; *Malaby v. Rice*, 21 M. R. 29, 15 Colo. App. 364, 62 P. 228. Nevertheless, the legal title passes by the patent, to the patentees and to them only, and while the ousted co-tenant will, in equity, upon proper proceedings be declared a beneficiary under the patent, yet if he is aware of the proceeding in time and has opportunity, undoubtedly the better course is to adverse. By Rule 53 the land office regards a co-tenant in such case as a protestant rather than an adverse claimant and does not require suit in support of the protest; but if he elects to bring suit the application will be stayed to await its determination.—25 L. D. 495, 26 *Id.* 220. On protest filed the department will give co-owners opportunity to litigate in Court the disputed title.—30 *Id.* 364. The distinction here attempted is refined. There is nothing in

the *Turner* case construed in 25 L. D. 495 to intimate that a co-tenant may not, if he wish, file his adverse claim.

The provisions of Sec. 2325 were intended only to apply to adverse claims arising out of conflicting locations, and not to controversies between co-owners. But if one co-tenant be ousted he has the common law right to sue, and it does not weaken his case that he has filed an adverse claim and brings suit in support of it.—*Davidson v. Fraser,* 36 Colo. 1, 4 L. R. A. (N. S.) 1126, 84 P. 695; *Allen v. Blanche M. Co.,* 46 Colo. 199, 102 P. 1072.

The several remedies open to an ousted co-tenant in such case are considered in *O'Hanlon v. Ruby Gulch Co.,* 48 Mont. 65, 135 P. 914, which also holds that such a tenant may lose his rights by laches.

Time to File.

The period is strictly limited to 60 days, excluding the first day.—13 L. D. 718, 28 *Id.* 224.

To instance: Where first publication was on October 19 they excluded the first day and counted:

October 12 days;

November 30 days;

December 18 days;

total 60 days, and made December 18th, the last day on which an adverse could be filed.—13 L. D. 286, 16 L. D. 101.

Time Can Not Be Extended.

No adverse claim can be received after the expiration of the statutory period, and the department is without authority to enlarge the time for filing.—29 L. D. 467.

So also the 30 days' time allowed for commencing suit can not be extended; the law limiting the period is mandatory; if the papers intended to commence suit are delayed in the mail, or action is delayed through the agency of an attorney corrupted, the land office can afford no relief.—2 L. D. 707;

Sickel, 190, 320. But the department will not review a judicial determination that a suit was initiated within the statutory period.—23 L. D. 20, 37 L. D. 484.

Republication.

When for any cause a republication is required, the adverse claim must be re-filed during the second period of advertising; but no additional filing fee is charged.—Sickel, 313.

Where there has been a material misdescription in the published notice a republication (and in this case a resurvey) will be ordered, although applicant has already made final entry.—17 L. D. 565.

Sunday—Holidays.

It has been ruled that an adverse may be filed on Sunday, when the last day falls on Sunday; and out of office hours on any day; but that the receiving and filing out of office hours, or on Sunday, is not compulsory upon the officers.—6 L. O. 73, 23 L. D. 546. But if the 60th day fall on Sunday the adverse is too late if filed on the succeeding Monday.—34 L. D. 568, overruling contrary holdings in 8 L. D. 430 and 13 L. D. 718 where the last day fell on a legal holiday.

Amendment.

An adverse claim can not be withdrawn for amendment; but if a material defect should be discovered, there would be nothing to prevent the filing of a second adverse, complete in itself, provided the 60 days had not expired.—Copp, 121, 155, 227; Sickel, 208.

An Appeal Lies from the Rejection of an Adverse Claim.—13 L. D. 718. In an instance where an adverse had been filed which was dismissed as defective but the adverse claimant brought his suit and filed his certificate, the land office declined to allow further action on the application until the decision of the suit.—2 L. D. 706.

If the adverse claim is dismissed by the local land office the adverse claimant must nevertheless bring suit within the 30 days or his rights will be gone although he sustain his contention on appeal to Washington from the dismissal of his adverse. This manifestly wrong and unjust ruling was the final result of all possible holdings on the point, in the various branches of the Land Department, in the case of a lode called the *"No Mistake."*—22 L. D. 274. Similar ruling where the adverse was rejected.—35 L. D. 304.

What Claims Should Adverse.

Of course lode must adverse lode and mill site must adverse mill site and placer must adverse placer or all pretense of prior title will cease to be of avail.—See pages 171 and 299.

A placer must adverse a lode application; otherwise the lode will take the full area. A lode claim need not necessarily adverse a placer because it may rely on the statutory exclusion of known lodes, but it is safer to file an adverse as the best means of protecting its title.—26 L. D. 627.

San Francisco Co. v. Duffield was an adverse suit by lode against placer, and it was held properly brought.—201 F. 830, 120 C. C. A. 160.

The department held in 1 L. D. 566 (Rev. Ed. 555) that a mill site must adverse a lode location, but to the contrary in 25 L. D. 7, 36 L. D. 144. And in still other cases (29 L. D. 522, 35 *Id.* 495) it holds that an adverse is not allowed in any instance between mineral and non-mineral claimants; that a suit supporting it will not stay proceedings on an application for a mineral patent; that the question of known mineral value must be decided by the department and that a decision of that point by a Court does not conclude the department. Lindley, Secs. 717, 724, apparently takes the same position.

But there have been frequent instances where such adverses have been filed and sustained.—*Shafer v. Constans,* 3 Mont. 369, 1 M. R. 147; *Durgan v. Redding,* 103 F. 914; *Cleary v. Skiffich,* 28 Colo. 362, 89 Am. St. Rep. 207, 65 P. 59, 21 M. R.

284. The mineral character of the land is by no means the only issue which may be involved in such suits, and the procedure to obtain a mill site patent being authorized in the same act which prescribes the procedure for patenting mining claims proper, we do not perceive strength in the contention that they can not adverse each other. Even lot owners have been allowed to adverse.—*Bonner v. Meikle,* 82 F. 697, 19 M. R. 83; *Young v. Goldsteen,* 97 F. 303. But the later case of *Wright v. Hartville,* 13 Wyo. 497, 81 P. 649, 82 P. 450, takes the same view as the land office on the whole question of adverses between mineral and non-mineral claimants.

There is an evident distinction between the case of the lot owner and the mill site owner more favorable to the right of the mill site owner to adverse.

Under this unsatisfactory status of the authorities it is advisable to file both adverse and protest, as there is no certainty that the land office will maintain its present position as to the right of a mill site to adverse a mining application and *vice versa.*

The holder of a right to purchase a mining claim need not adverse an application for patent; because he is in privity with the title.—*Nowell v. McBride,* 162 F. 432, 89 C. C. A. 318.

Miscellaneous Rulings.

An adverse claim substantiallly defective may be rejected.—3 L. O. 18, 9 L. O. 5. But if it show the nature, boundaries and extent of the claim, the land office will accept it even though it do not meet all the requirements of the regulations.—27 L. D. 358.

The land office is not bound to receive an adverse claim when the filing fee is not paid or tendered.—29 L. D. 413.

Where there is no surface conflict an adverse filed to anticipate conflict expected *on the dip,* will not be received.—6 L. D. 318, 29 *Id.* 662; *Champion Co. v. Wyoming Co.,* 75 Cal. 78, 16 M. R. 145, 16 P. 513.

An adverse based on a claim located after the publication began not containing allegations denying the validity of the prior claim adversed, will be rejected.—7 L. O. 50; *contra,* 2 L. D. 699.

Suit in Support of Adverse.

After the adverse claim is filed, the adverse claimant must bring suit for the premises in dispute within 30 days, under the terms of R. S. Sec. 2326. See page 599.

If his suit is not brought within the 30 days the adverse claimant has no standing in the land office except as a mere protestant; and the applicant may proceed to enter, notwithstanding the adverse.—14 L. D. 180, 35 *Id.* 550.

It has been held that failure to bring suit within the 30-day period must be specially pleaded and can not be availed of for the first time on appeal.—*Providence Co. v. Marks,* 7 Ariz. 74, 60 P. 938.

A suit in Nevada is commenced when complaint is filed and summons issued. The adverse claimant filed his complaint within the 30 days, but summons did not issue or at least was not placed in the Sheriff's hands until some time thereafter. But the defendant entered a general appearance and filed a demurrer which was held a waiver of any right to object to the failure to issue summons.—*Harris v. Helena M. Co.,* 29 Nev. 506, 92 P. 1.

The Proper Court Is Usually the District Court of the County

where the mine is situate, except in those cases where the facts of value and diverse citizenship are such that the U. S. District Court may have jurisdiction.

It has been authoritatively held that an adverse claim suit presents no federal question and that the U. S. Courts have no jurisdiction on that ground.—*Blackburn v. Portland Co.,* 175 U. S. 571, 20 Sup. Ct. Rep. 222, 44 L. Ed. 276, 20 M. R. 358; *Mt. View Co. v. McFadden,* 180 U. S. 533, 21 Sup. Ct. Rep. 488, 45 L. Ed. 656.

Even when the Courts of the United States have undoubted jurisdiction the State Court is not ousted, but the suit may be commenced in the State Court, subject to defendant's right of removal.

Proof of Commencing Suit.

After the complaint is filed a certificate should be made and signed by the clerk of the Court and filed in the local land office in substance as follows:

JJ. CERTIFICATE OF SUIT.

STATE OF COLORADO, } ss.
County of *Gilpin*. }

I, *Morris Hazzard*, Clerk of the District Court of said County, do hereby certify that *Charles W. Bishop* did on the 10th day of *June*, A. D. 1916, commence an action in said Court against *Carroll Carter*, to sustain an adverse claim against the *Busy Bee* lode, survey lot No. 21000 A, situate in *Wisconsin* mining district, *Gilpin* County, State of Colorado, and to recover possession of all that parcel of the *Elephant* lode embraced within the lines of said survey lot, and that said action is now pending and undetermined in said Court.

Attest my hand and the seal of said Court at *Central City* this 10th day of *June*, A. D. 1916.

[SEAL OF COURT.] MORRIS HAZZARD,
Clerk.

But the failure to file this certificate is not fatal under Rule 88, which requires the applicant to file certificate showing affirmatively that no suit has been brought.

When a Suit Is Already Pending Between the Same Parties

for the recovery of the ground in conflict at the time of the filing of the adverse, it has been ruled that such suit may stand as the suit to support the adverse and no new suit need be brought.—8 L. D. 437, 29 *Id.* 194. In such case the plaintiff can not dismiss so as to leave the adverse without suit supporting it.—*Axiom Co. v. Little*, 6 S. D. 438, 61 N. W. 441. If no adverse is filed, a pending suit will not stay patent proceedings.—33 L. D. 187.

The Suit in Support of an Adverse Is Ordinarily at Law by

ejectment and such suit is certainly contemplated in the statute (page 646) by the use of the clause "the jury shall so find." Such is undoubtedly the form of action where the plaintiff, as is usually the case, is out of possession. But where the plaintiff is already in possession he may proceed in equity by bill to quiet title. This view making the form of action depend upon whether plaintiff is in or out of possession is that which is clearly expressed by the final authority in such cases.—*Perego v. Dodge,* 163 U. S. 165, 16 Sup. Ct. Rep. 971, 41 L. Ed. 113, 18 M. R. 364.

There had been decisions holding in general terms that ejectment was the proper remedy.—*Becker v. Pugh,* 9 Colo. 589, 13 P. 906, 15 M. R. 304; *Manning v. Strehlow,* 11 Colo. 451, 18 P. 625; *Burke v. McDonald,* 2 Ida. 310 (339), 13 P. 351; *Ware v. White,* 81 Ark. 220, 108 S. W. 831; and others asserting it to be an equitable action.—*Doe v. Waterloo Co.,* 43 F. 219; *Shoshone Co. v. Rutter,* 87 F. 801, 31 C. C. A. 223, 19 M. R. 356; *Providence Co. v. Burke,* 6 Ariz. 323, 57 P. 641, 19 M. R. 625; *McFadden v. Mt. View Co.,* 97 F. 670, 38 C. C. A. 354; *Butte Co. v. Barker,* 35 Mont. 327, 89 P. 302, 90 P. 177; but the *Perego case* states the obvious test of possession as determining the form of action.

Where the adverse claimant's title was purely legal his bill in equity was dismissed.—*Johnson v. Munday,* 104 F. 594, 44 C. C. A. 64, 21 M. R. 96.

If neither party is in actual exclusive possession or if the facts render the point doubtful the claimant can treat the application as an ouster and proceed at law.—*Becker v. Pugh,* 15 M. R. 304, 9 Colo. 589, 13 P. 906. See page 437.

In agreement with the *Perego case* and with these views are the cases of *Durgan v. Redding,* 103 F. 914; *Young v. Goldsteen,* 97 F. 303; *Book v. Justice Co.,* 58 F. 827.

The cases which hold that it is of itself and without regard to possession an equitable action lose sight of the fact that the adverse and the suit are independent proceedings. The adverse

being filed in the land office, the government, the trustee of the title—directs the contestants to adjudicate their controvery in a "Court of competent jurisdiction." It then allows the winning party to report his obedience to the direction,—his success in the suit—and the patent application resumes its progress. There is no connection between the two procedures such as to bring the cause within any one of the limited schedule of the subjects of equitable jurisdiction. But if at the proper time for bringing suit the plaintiff be in possession he has the right to bring suit in equity to quiet title: the same suit which he could maintain if there were no controversy pending in the land office.

Parties.

The plaintiff is, of course, the adverse claimant and the defendant the applicant, but where the contestants after adverse filed conveyed to one of their number it has been held that the suit may be brought in his name alone.—*Willitt v. Baker*, 133 F. 937.

The applicant should be made a defendant, although he has sold his interest before suit brought.—*Blackburn v. Portland Co.*, 175 U. S. 571, 20 Sup. Ct. Rep. 222, 44 L. Ed. 276, 20 M. R. 358. The Court recognizes the relation of the suit to the land office proceedings and looks to an adjudication of title not to a technical question of proper parties.—*Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289, 30 L. Ed. 474, 15 M. R. 309.

Complaint.

The complaint should, of course, describe the area in conflict following the lines of plat "B" in the adverse. If it declare for the whole claim it would necessitate a disclaimer as to parcel of the premises. But to the holding that the complaint is so intimately associated with the adverse claim that a failure to describe the exact area in conflict would render it fatally defective we can not assent, though such has been the ruling in two cases.—*Cronin v. Bear Creek Co.*, 3 Ida. 614, 32 P. 204, 17 M. R. 548; *Smith v. Imperial Co.*, 11 Ariz. 193, 89 P. 510.

KK. FORM OF COMPLAINT.

STATE OF COLORADO, }
County of *Gilpin*. } ss.

In the District Court of said County.

Charles W. Bishop, Plaintiff,

v.

Carroll Carter, Defendant.

The plaintiff complains and alleges:

1. That on to-wit: The 1st day of *January*, A. D. 1897, and ever since hitherto he was, and is, the owner and in actual occupation of the *Elephant* lode mining claim, 1500 feet in length by 150 feet in width, situate in *Wisconsin* mining district, County and State aforesaid.

2. That the plaintiff is, and at all times mentioned in this complaint hath been, a citizen of the United States. *(or)*

2. That at and before the date last aforesaid the plaintiff had declared his intention to become a citizen of the United States before a court of record, to-wit: The Court of Common Pleas of the County of Allegheny, Commonwealth of Pennsylvania.

3. That he has and claims the legal right to occupy and possess said premises and is entitled to the possession thereof by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and of said State of Colorado, by preemption (and purchase) and by actual prior possession, as a lode mining claim, located on the public domain of the United States.—See Code, Sec. 286.

4. That on, to-wit: The 3rd day of *January*, A. D. 1916, the defendant wrongfully entered upon parcel of said claim, to-wit: All that part of said claim which is intersected by the exterior lines of the *Busy Bee* lode mining claim, Survey Lot No. 21000 A, as shown by plat marked Exhibit B, filed on the 3rd day of *June*, A. D. 1916, in the land office of the United States, at *Denver*, in the said State, with the adverse claim of the plaintiff against the entry of said *Busy Bee* lode for patent, such ground so intersected being described as follows: *(here interference should be described by metes and bounds)* and that defendant hath every since hitherto wrongfully withheld the possession of said parcel of said *Elephant* lode mining claim from the plaintiff to his damage in the sum of one hundred dollars.

5. That said adverse claim was filed in said Land Office within the period of sixty days of publication of the notice of application for patent on said *Busy Bee* lode and this suit is brought before the expiration of the period of thirty days after the filing of said adverse claim.

6. That this suit is brought in support of said adverse claim, and that plaintiff necessarily disbursed, expended and paid out the sum of twenty-five dollars for plats, abstracts and copies of papers filed in said land office with his said adverse claim, and also a reasonable counsel fee, to-wit: Fifty dollars, for the expense of preparing his said adverse claim.

Wherefore plaintiff prays judgment against the defendant:

1. For the recovery of possession of said parcel of said *Elephant* lode mining claim.

2. For the sum of one hundred dollars damages.

3. For the sum of seventy-five dollars expended in support of said adverse claim.

4. For costs of suit.

A. R. MORRISON,
Attorney for Plaintiff.

Add verification if desired; but in actions of ejectment, trespass, etc., the practice of verifying the pleadings ought to be discouraged.

The above form was expressly approved in *Jackson v. McFall*, 36 Colo. 119, 85 P. 638.

Averment of Citizenship.

It is the practice to aver the citizenship of the parties in their respective pleadings. The forms above given contain such allegation, and if issue is taken on it the fact must be proved.—*Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786, 20 M. R. 722, 62 P. 894. See Citations, p. 390.

The citizenship of the parties is a material issue in an adverse claim suit.—*Matlock v. Stone*, 77 Ark. 195, 91 S. W. 553.

A failure to aver citizenship in the pleadings where it was in fact proved at the trial was held immaterial in *Lozar v. Neill*, 37 Mont. 287, 96 P. 343.

As to complaints omitting the allegations of paragraph 5 in the form above, see p. 438.

Costs.

Paragraph 6 of the above form is based on R. S. Colo. 1061. The costs in such section *strictly construed*, could not be made

to include more than the expense of abstract, plat and attorney's fee. It is customary between counsel to concede without proofs that $75 has been paid under this allegation.

Land office costs are not taxable.—*Golden Co. v. National Co.*, 28 Ida. 290, 154 P. 207.

Complaint Detailing History of Location.

There is another style of complaint which sets forth chronologically the fact of discovery, of sinking the shaft, its depth, and what it disclosed; the placing of the location stake, the marking of the claim, and the record; following the language of the statute concerning location, etc. But many claims are sufficiently valid to maintain ejectment without a strict location, or the defendant may be in position where he is estopped from attacking weak points in the plaintiff's case. In any event such recitals lead to cumbersome pleadings and to immaterial issues, and are not the ultimate facts required to be stated in code pleading.

General allegations of title are sufficient.—*Rough v. Simmons*, 65 Cal. 227, 3 P. 804, 15 M. R. 298. But the complaint sustained in that case is the extreme of loose pleading.

Relation of the Suit to the Application.

It has, as we believe, been rightly held that an ordinary complaint in ejectment making no reference to the land office proceedings will support the adverse claim.—*Deeney v. Mineral Creek Co.*, 11 N. M. 279, 67 P. 724, 22 M. R. 47; *Altoona Co. v. Integral Co.*, 114 Cal. 100, 45 P. 1047; *Upton v. Santa Rita Co.*, 14 N. M. 96, 89 P. 275.

The suit being determined and certified copy of its judgment roll being filed in the land office showing that it was between the same parties, that it determined the right of possession to the same property and was brought at a date found to be within 30 days of the filing of the adverse—what more is necessary to connect the two proceedings and to show that the suit was the same suit intended by the terms of R. S. Sec. 2326?

But departing from this obviously plain view of the proceeding the Courts of the various States have scattered widely on the point as to whether at all or to what extent the pleadings should recite their relation to and connection with the defendant's application and the plaintiff's adverse. The various holdings are concisely digested in 2 Lindley, Sec. 754.

The forms above given are a concession to the contention that the proceedings should be tied together by formal reference to the land office filing and fully meet the requirements of those Courts which hold such averments essential.

But while conceding as above to what is demanded by some of these decisions, and conceding as well that it is the better practice, we do not concede that a complaint ought to be held bad if they were all omitted.

In *Mattingly v. Lewisohn,* 13 Mont. 508, 35 P. 111, 17 M. R. 693, Montana held that the averment of the filing of the adverse and bringing of the suit in due time were material averments. This ruling was reaffirmed in *Thornton v. Kaufman,* 35 Mont. 181, 88 P. 796. But it may be inferred by implication from dates in the complaint.—*Helbert v. Tatem,* 34 Mont. 3, 85 P. 733.

In *Cronin v. Bear Creek Co.,* 3 Ida. 614, 32 P. 204, 17 M. R. 548, Idaho held that although these dates were conceded by stipulation their absence from the complaint rendered it so defective that it would not support a judgment. Thus the patent justice of the case was sacrificed to support a technicality in code pleading.

But these decisions are against the current of authority.—*Pennsylvania Co. v. Bales,* 18 Colo. App. 108, 70 P. 444, 22 M. R. 436; *Rawlings v. Casey,* 19 Colo. App. 152, 73 P. 1090; *Providence Co. v. Marks,* 7 Ariz. 74, 60 P. 938; *Quigley v. Gillett,* 101 Cal. 462, 35 P. 1040, 18 M. R. 68.

In Arizona it has been held that the suit is "Neither an action at law, nor, strictly speaking, one in equity"; that the plaintiff must allege and prove and practically duplicate all that is required in the land office; and a complaint was held defective beyond amendment because it did not aver "that

the ground in controversy was mineral land subject to location."—*Keppler v. Becker*, 9 Ariz. 234, 80 P. 334.

We can not see value received to any party to the contest nor any reason in practice or on principle to justify these refinements in pleading.

A suit supporting an adverse claim is essentially a law action, but as the parties below treated it as an equity case the decree is not reversible on that ground.—*Ware v. White*, 81 Ark. 220, 108 S. W. 831.

The words "jury shall so find" in the act referring to adverse suits where neither party shows a valid location, seem to us a binding statutory construction to the point that it is or may be a case at law; for jury verdicts, except as advisory verdicts, are unknown to equity practice.

Amendment of Complaint.

Contrary to the ruling on the same point in the *Keppler case* above cited, *Deeney v. Mineral Creek Co.*, 11 N. M. 279, 67 P. 724, 22 M. R. 47, and *Woody v. Hinds*, 30 Mont. 189, 76 P. 1, both hold that the complaint may be amended after the 30-day period has expired.

LL. ANSWER.

STATE OF COLORADO, } ss.
County of *Gilpin*. }

In the District Court of said County.

Charles W. Bishop, Plaintiff,
v.
Carroll Carter, Defendant.

Defendant answering the complaint says:

For a first defense:

1. He denies that on the date charged in complaint or at any time the plaintiff was or is the owner or was in the occupation, actual or otherwise, of the *Elephant* lode mining claim described in said complaint.

2. He admits (or denies) that the plaintiff is a citizen of the United States.

3. Defendant denies that plaintiff has or claims the legal right to occupy and possess said premises or is entitled to the possession thereof,

and denies that he hath complied with the local laws or rules of miners in said *Wisconsin* mining district, the laws of the United States, or of said State of Colorado, in the pre-emption, discovery, or location of said so-called *Elephant* lode mining claim.

4. Defendant denies that at the time charged in paragraph four of complaint, or at any time, the defendant wrongfully entered upon the parcel of said claim described in said paragraph or any part thereof, or that he hath ever since, hitherto, or at any time, wrongfully withheld possession of said premises from the plaintiff and denies that the plaintiff is damaged in the sum of $100 or in any sum, or at all.

5. Defendant admits the allegations of paragraphs five and six of the complaint.

For a second defense, defendant says:

1. That he is a citizen of the United States, and that ever since, to-wit: The 23rd day of *June*, 1894, he was and is the owner and in actual occupation of the *Busy Bee* lode mining claim, 1500 feet in length by 150 feet in width, situate in said *Wisconsin* mining district, County and State aforesaid.

2. That he has and claims the legal right to occupy and possess said *Busy Bee* lode mining claim, and is entitled to the possession thereof by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States and of said State of Colorado, by pre-emption (and purchase) and by actual prior possession as a lode mining claim located on the public mineral domain of the United States.

3. And that the premises sued for in said complaint are parcel of said *Busy Bee* lode mining claim, the property of this defendant.

DEWEY C. BAILEY, JR.,
Attorney for Defendant.

A Replication Must Be Filed to Such Second Defense or the defendant will be entitled to judgment.—*Newman v. Newton*, 14 F. 634, 4 McCrary 293. But if parties go to trial on the merits, defendant will be assumed to have waived this right.—*Quimby v. Boyd*, 8 Colo. 194, 6 P. 462.

And in Wyoming, in *Iba v. Central Ass'n*, 5 Wyo. 355, 40 P. 527, 42 P. 20, the Court took the very tenable position that the second defense was only in effect a traverse of the complaint and did not require any replication.

Plea of Abandonment and Relocation.

In *Bryan v. McCaig,* 10 Colo. 309, 15 P. 413, the Supreme Court of Colorado held that an issue as to annual labor was made by general traverse of plaintiff's title in an adverse claim suit. Cited and followed in *Duncan v. Eagle Rock Co.,* 48 Colo. 569, 587, 139 Am. St. Rep. 288, 111 P. 588. And to like effect, in Nevada, *Steel v. Gold Co.,* 18 Nev. 80, 15 M. R. 292, 1 P. 448, holds that under the general allegation each party parades the validity of his own title on whatever grounds established.

If when a claim is abandoned it becomes, as it does, a part of the public domain (*Migeon v. Montana Co.,* 77 F. 249, 23 C. C. A. 156, 18 M. R. 446): Why is not an allegation, that the defendant at a date later than the abandonment entered on the public domain and discovered and located his claim, a sufficient averment of entry upon unoccupied ground?

In *Morenhaut v. Wilson,* 52 Cal. 263, 1 M. R. 53, it was ruled that while abandonment could be proved under the general issue, forfeiture must be specially pleaded. The distinction seems of no particular value, for abandonment by one party unless followed by the entry of the other to advance the abandonment to forfeiture can not amount to a material issue.

Another line of reasoning is that forfeitures are odious; the party alleging forfeiture must prove it strictly; the presumptions are all against it, and, being a special incident not necessarily associated with the party's title, it should be alleged in the complaint or answer; that is, should be specially pleaded.—*Wulf v. Manuel,* 9 Mont. 276, 279, 286, 23 P. 723; *Mattingly v. Lewisohn,* 13 Mont. 508, 35 P. 111, 17 M. R. 693.

This conflict of authority is referred to in *Johnson v. Young,* 18 Colo. 625, 629, 34 P. 173.

But the later case of *Duncan v. Eagle Rock Co.,* 48 Colo. 569, 587, 139 Am. St. Rep. 288, 111 P. 588, expressly decides that forfeiture need not be specially pleaded in an adverse claim suit. Also, *Merchants Bank v. McKeown,* 60 Or. 325, 119 P. 334.

Abandonment is wholly immaterial if no issue (directly or indirectly) has been made upon it.—*Mattingly v. Lewisohn, supra; Coleman v. Davis,* 13 Colo. 98, 21 P. 1018.

And a party who makes a relocation of an abandoned claim as such can not attack defects in its original location notice.—*Yosemite Co. v. Emerson,* 208 U. S. 25, 28 Sup. Ct. Rep. 196, 52 L. Ed. 374.

In a plea of forfeiture "labor" and "improvements" are not synonymous terms and the non-doing of one and the non-performance of the other must be both averred.—*Power v. Sla.,* 24 Mont. 243, 61 P. 468, 20 M. R. 659.

The Court will not allow an amendment to show that defendant failed to do his work for a certain year, the plaintiff not having made any relocation after the failure.—*Nichols v. Williams,* 38 Mont. 552, 100 P. 969.

Adverse Against Void Claim, Relocation.

The Quaking Asp being a prior subsisting claim, the Dog Nest was located over it, its discovery shaft being within the lines of the prior claim and the location therefore void. Afterwards the prior claim (as was alleged) failed to do its annual labor and the Dog Nest filed a relocation certificate, applied for patent and was adversed by the Quaking Asp. *Held,* that the relocation statute was for the benefit of defective, not void, locations and that the relocation certificate was a nullity.—*Sullivan v. Sharp,* 33 Colo. 346, 80 P. 1054.

The opinion everywhere has always been that a relocation perfected the original location if in any respect defective, or, if void, the incident which rendered it void being at the time of relocation gone, it operated as an original location. The case of *Strepey v. Stark,* 7 Colo. 620, 5 P. 111, 17 M. R. 28, so decides in terms. The doctrine that a relocation could not cure a location originally void is absolutely novel and contrary to all the cases which have approached the point.—*Beals v. Cone,* 27 Colo. 473, 83 Am. St. Rep. 473, 62 P. 948, 20 M. R. 591; *Tonopah Co. v. Tonopah Co.,* 125 F. 389, 390.

The Verdict Should Show That the Winning Party Is entitled to possession by virtue of making a valid location of the claim.—*Burke v. McDonald,* 2 Ida. 646, 679, 33 P. 49, 17 M. R. 325. It should, of course, comply with all mandatory requirements of the code of the State where tried. But as it has been very rightfully held that neither party is required in the adverse suit to show that he has done everything entitling to patent (*Doe v. Waterloo Co.,* 70 F. 456, 17 C. C. A. 190, 18 M. R. 265), and the National Supreme Court upholds a general verdict for either party (*Bennett v. Harkrader,* 158 U. S. 441, 15 Sup. Ct. Rep. 863, 39 L. Ed. 1046, 18 M. R. 224), it would seem that such strictness as was insisted on in *McGinnis v. Egbert,* 15 M. R. 329, 8 Colo. 41, 5 P. 652, and *Manning v. Strehlow,* 11 Colo. 451, 18 P. 625, ought not now to be required. A general verdict of guilty in ejectment is sufficient.—*Upton v. Santa Rita Co.,* 14 N. M. 96, 89 P. 275.

MM. VERDICT FOR PLAINTIFF.

We, the jury, find the issues in favor of the plaintiff, and that he is the owner by discovery (or purchase) and location and has established his right to the possession and occupancy of the premises described and claimed in the complaint, to-wit: *All that part of the Elephant lode mining claim covered by the survey of the Busy Bee lode mining claim, Survey Lot No.* 21000 A; and that he, the plaintiff, is such owner and entitled to recover said premises of and from the defendant by virtue of full compliance with the statutes of the United States and of the State of Colorado in the discovery and location of said *Elephant* lode mining claim. And that he expended and should recover from the defendant the sum of seventy-five dollars expenses and counsel fee as claimed in his complaint.

NN. VERDICT FOR DEFENDANT.

We, the jury, find the issues in favor of the defendant, and that he is the owner by discovery (or purchase) and location and has established his right to the possession and occupancy of the premises described and claimed in the answer, to-wit: The *Busy Bee* lode mining claim, Survey Lot No. 21000 A, and that he, the defendant, is such owner by virtue of full compliance with the statutes of the United States and of the State of Colorado in the discovery and location of said *Busy Bee* lode mining claim.

The above forms comply with Section 288 of the Code and with other points peculiar to an adverse suit, as suggested in said decisions of the Supreme Court of Colorado.

Rulings in Ejectment Supporting Adverse.

Declarations of a locator may be given in evidence to dispute his title.—*Harrington v. Chambers, supra; Muldoon v. Brown,* 21 Utah 121, 59 P. 720, 20 M. R. 269; *Morgan v. Myers,* 159 Cal. 187, 113 P. 153. But not admissions made after he has parted with his title.—*McGinnis v. Egbert,* 15 M. R. 329, 8 Colo. 41, 5 P. 652. And in *Willison v. Ringwood,* 194 F. 550, 111 C. C. A. 401, they were excluded on the further ground that the witness was within the jurisdiction of the Court and should have been called as a witness.

A post marked as a center post may be shown in adverse suit to have been intended for a corner post.—*Sharkey v. Candiani,* 48 Or. 112, 7 L. R. A. (N. S.) 791, 85 P. 219.

An adverse claimant may show that the location adversed is invalid by reason of the existence of a third claim in which neither party has any interest.—*Harrington v. Chambers,* 3 Utah 94, 1 P. 362. Affirmed, *Chambers v. Harrington,* 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28 L. Ed. 452, but with only a general reference to this point in the last paragraph. To the contrary seems *Strepey v. Stark,* 7 Colo. 614, 5 P. 111, 17 M. R. 28. See EJECTMENT, p. 436.

Diligent Prosecution.

The Land Office can not adjudicate upon the question whether the suit is being prosecuted with due diligence.—22 L. D. 16; *Richmond Co. v. Rose,* 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29 L. Ed. 273; *Rose v. Richmond Co.,* 17 Nev. 25, 27 P. 1105. In *Mars v. Oro Fino Co.,* 7 S. D. 606, 65 N. W. 19, the suit was dismissed for delay in securing service.

Dismissal and Reinstatement.

Jurisdiction once attached remains and where default was had, but the cause reinstated, the adverse holds, notwith-

standing the certificate of no suit pending had been filed during the interval.—1 L. D. 542; Rev. Ed. 539. Nor will a receiver's receipt obtained in such interval be allowed in evidence.—*McEvoy v. Hyman,* 25 F. 539, 15 M. R. 300; *Deeney v. Mineral Co.,* 11 N. M. 279, 67 P. 724, 22 M. R. 47.

Waiver—Withdrawal or Failure to Support.

An adverse claim may be withdrawn either before or after bringing the suit, thereby waiving all rights claimed.—4 L. D. 117; 29 L. D. 89. Or by voluntarily dismissing the suit.—4 L. D. 273. And when suit is dismissed certificate to that effect must be filed. Upon failure to issue summons within the period required by the code, the complaint may be dismissed.—*Steves v. Carson,* 21 Colo. 280, 40 P. 569, and a second suit can not afterwards be brought.—*Steves v. Carson,* 42 F. 821, 16 M. R. 12. See Rules 86, 87.

The Court Trying the Adverse Suit May Give Full Relief

and if necessary restore the successful party to possession.—*Silver City Co. v. Lowry,* 19 Utah 334, 57 P. 11, 20 M. R. 55.

Defects in the Adverse Claim Are Not Material to the Issue

at law between the parties, and are for departmental consideration only.—*Rose v. Richmond Co.,* 17 Nev. 25, 27 P. 1105; *Quigley v. Gillett,* 101 Cal. 462, 35 P. 1040, 18 M. R. 68.

The practice after suit commenced is under State law and the proceedings in the Land Office are immaterial to the trial.—*Bernard v. Parmelee,* 6 Cal. App. 537, 92 P. 658.

Title in Neither Party.

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.—A. C. March 3, 1881.

The rulings under the above Act are, that each party is practically a plaintiff and must show his title.—*Slothower v. Hunter,* 15 Wyo. 189, 88 P. 36; but that if neither shows title the verdict must be special—which is an assertion that the title remains in the United States, so far, at least, as the litigating parties are concerned.—*Jackson v. Roby,* 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27 L. Ed. 990; *Rosenthal v. Ives,* 15 M. R. 324, 2 Ida. 244, 265, 12 P. 904. See p. 622.

The effect of the Act is to prevent a recovery upon possession alone in ejectment supporting adverse.—*Becker v. Pugh,* 9 Colo. 589, 13 P. 906, 15 M. R. 304; *Upton v. Santa Rita Co.,* 14 N. M. 96, 88 P. 275.

In *Ware v. White,* the opinion, entirely overlooking the terms of the statute referring to cases where titles shall not be established by either party, says: "The question of appellant's title is not for adjudication, but appellee's."—81 Ark. 220, 228, 108 S. W. 831.

After judgment of title in neither party the Land Office will not allow the application to be perfected.—*Newman v. Barnes,* 23 L. D. 257.

Non-Suit—Defendant's Proof of Title.

It has been held that plaintiff may be non-suited as in an ordinary ejectment.—*Kirk v. Meldrum,* 28 Colo. 453, 459, 65 P. 633, 21 M. R. 393; *McWilliams v. Winslow,* 34 Colo. 341, 82 P. 538.

But if the defendant be content with such judgment and fail to prove his own title he runs the risk of rejection of his application in the Land Office.—*Kirk v. Meldrum,* 28 Colo. 453, 459, 65 P. 633, 21 M. R. 393.

Plaintiff at this point is out of court and can not demand a jury view or cross examine or otherwise attack the title of the defendant who is now proceeding *ex parte* to secure a judgment upon which to predicate his right to a patent.—*Moffat v. Blue River Co.,* 33 Colo. 142, 80 P. 139; *Connolly v. Hughes,* 18 Colo. App. 372, 71 P. 681; *McMillen v. Ferrum Co.,* 32

Colo. 38, 105 Am. St. Rep. 64, 74 P. 462; *Benton v. Hopkins*, 31 Colo. 518, 74 P. 891; *Lozar v. Neill*, 37 Mont. 287, 96 P. 343.

Entry of the Area Not in Dispute.

The department has ruled that where the adverse covers only parcel of the applying claim the applicant may go to entry and patent on the area not in controversy and without waiver of any rights, defend against the contest of the adverse claimant in the suit supporting adverse.—2 L. D. 744, 22 L. D. 343.

Where the discovery shaft is upon the ground excluded in favor of a prior survey, such fact does not invalidate the application where the applicant makes good his adverse for the excluded area.—28 L. D. 321.

Proceedings After Determination of Suit.

The Land Office requirements in such case are stated in Rule 85.

If the judgment is in favor of the defendant (the applicant) he files a certified copy of the judgment roll (14 L. D. 308), and is allowed to pay for and enter the claim or so much thereof as has been awarded to him.

If the judgment is in favor of the adversing party, he files certified copy of the judgment roll, and must obtain and file plat and survey, and file full set of final entry papers; in fact, he must perform whatever is required of an applicant, except, of course, the posting and publication.—39 L. D. 353.

He must also furnish the Surveyor General's certificate of $500 improvements.—43 L. D. 499.

The adverse claimant in such proceeding enters only the area in conflict recovered by his judgment.—27 L. D. 375. If he desires to patent his full claim he must apply in all respects, including posting and publication, as an original applicant.

In such case where he has already begun his application and excluded defendant's prior survey, the judgment roll shows him entitled to and he is allowed to enter such ground,

although originally excluded. If he does not begin his application until after he has obtained judgment, his application will include the area formerly in conflict.

An adjudication of priority in favor of part of a lode seems to be an adjudication of priority on the questions arising in any later form of controversy between the same lodes.—*Last Chance v. Tyler Co.*, 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39 L. Ed. 859, 18 M. R. 205; *Bunker Hill Co. v. Empire Co.*, 109 F. 538, 48 C. C. A. 665; *Empire Co. v. Bunker Hill Co.*, 114 F. 420, 52 C. C. A. 222. But see *U. S. M. Co. v. Lawson*, as cited *ante*, p. 176.

Compromised Cases.

Where the suit is compromised, if there is only one adverse, it is more convenient to dismiss the suit, taking deed or bond for deed from the applicant. In such case, upon filing certificate of dismissal, the original survey goes to patent without further complications, and the defendant can convey after entry according to the terms of settlement.

But in all this class of cases, and especially where there are two or more adverses, legal counsel should be taken. A settlement between the applicant and one adversor can not bind a second adversor; there may be questions of retaining end lines, or the discovery shaft, or patent improvements; and it may be very material as affecting extralateral rights or on the issue of priority, as to which lode had best take the patented title.

Annual Labor Pending the Trial.

In the matter of the *Marburg Lode*, 30 L. D. 202, the department held that where entry has been stayed by the operation of a protest or adverse, a delay not chargeable to the applicant, the annual labor need not be kept up; that it will not recognize as protestant a relocation made during such interval, based on non-performance of labor. If such be the correct ruling we can not see why it should not also apply to the adversing claim. Questions of procedure in the Land O[illegible]e

are for that office to decide. Construction of statutes defining conditions of the title are for the Courts.—*Poore v. Kaufman*, 44 Mont. 248, 119 P. 785. The question is so nearly one of the latter class that in the absence of judicial decision to the same effect it is wholly unsafe to neglect the annual labor in reliance on this case.—See Rule 55 and 31 L. D. 69.

In *Willitt v. Baker*, 133 F. 937, the peculiar ruling was made that both plaintiff and defendant must show that they had respectively performed their annual labor during the preceding year.

Agreement to Not Adverse.

When contesting claimants agree with the applicants to file no adverse in consideration of the applicants undertaking to convey the title to the ground in conflict or some other interest in the claim when entry is made or patent issues—such agreement should be formally reduced to writing under signature and seal. Such a contract is not against public policy and will be enforced.—*St. Louis Co. v. Montana Co.*, 171 U. S. 650, 19 Sup. Ct. Rep. 61, 43 L. Ed. 320, 19 M. R. 575. In *Ducie v. Ford*, 138 U. S. 587, 11 Sup. Ct. Rep. 417, 34 L. Ed. 1091, a case of this kind but the contract verbal, it was held to be within the Statute of Frauds, *i. e.*, a contract void unless written, and the plaintiff went without relief. This decision, however, is largely based on asserted defects in the pleadings and can hardly be considered as holding that so gross an instance of wrong would be in all cases shielded by that statute. See *Poncia v. Eagle*, as cited *ante*, p. 171.

PROTEST.

The office of a protest is to show that no patent, such as applied for, should issue—as where a mill site patent is asked for on mineral ground.

Or that it should not issue to the particular applicant by reason of some defect of person, as that the applicant is an alien corporation; or for failure to comply with the practice of the department in some serious particular. It is not safe to rely on the presumption that the Land Office will of its own motion observe every departure from its own rules.

The protestant can never by his protest acquire title. He can at most defeat the efforts of the applicant. But if the protest be sustained and the applicant be compelled to begin *de novo*, as, for instance, where the irregularity pointed out to the department is a short publication and he is required to go back to that point and republish—upon the new proceedings or the republication the protestant has the opportunity to file his adverse claim. Any stranger to the original application would have the same right.—23 L. D. 395.

The fact that the protestant is or claims to be the real owner, or to have the better title, has its place in an adverse and is not a ground of protest.—22 L. D. 624; but it should be averred to give standing to the protestant.

The department will entertain a protest as provided in R. S. Sec. 2325, showing that "the applicant has failed to comply with the terms of this chapter"—that is, has made a substantially irregular step in his location or in his proceedings to obtain patent, as for instance that he has not disclosed mineral in his discovery shaft or elsewhere within the lines of the claim. —2 L. D. 743, 17 *Id.* 112, 27 *Id.* 396, 38 *Id.* 387; or that the posting was defective, or that $500 improvements were not made.—16 L. D. 532, 27 *Id.* 396; or any other serious want of conformity to the law or to the land office regulations.—16 L. D. 532.

But the fact that the discovery is not upon the public domain because upon location of the protestant's of alleged earlier date and other like points, which if availed of by adverse would have shown better title in the protestant, will not be considered as grounds of protest.—22 L. D. 624, 27 *Id.* 191, 26 *Id.* 580, 30 *Id.* 67.

A protest by a mineral claimant against an agricultural claim should state the kind of mineral and the character and general situation of the formation.—37 L. D. 401.

Upon protest the land office will cause an issue to be made upon the fact as to whether there was a valid discovery.—38 L. D. 387.

Appeal by Protestant.

A protestant claiming an interest is allowed the right of appeal.—8 L. D. 122, 16 *Id.* 532, 29 *Id.* 230. But if he has no such interest he is regarded as a mere *amicus curiae* and has no such right.—8 L. D. 439. A party having no surface conflict is not such a party in interest as to have the right to appeal.—6 L. D. 318, 19 *Id.* 356. Nor has a party whose only claim is by location made after the protest was filed.—19 L. D. 356.

A relocation by a protestant after entry does not entitle the protestant to an appeal.—39 L. D. 574.

The Test Between Adverse and Protest Is That Where a defect exists which is a matter of public interest, and which shows that the applicant has not proceeded regularly as to the United States or as to the entire body of prospectors who are entitled to see that all are required to proceed under like restrictions, a protest will be considered; but where the point is one of interest only as between the applicant and the protestant, or as between the applicant and a third party who is not complaining (21 L. D. 30, Mod. on Review, *Id.* 544), the protestant can not by his protest claim the right to litigate in this form what he should have contested by adverse.

FORM OF PROTEST.

In the matter of the Application of *The Anaconda Mining Company* for patent on the *Martha Becker* Mill Site, Survey Lot No. 930 B, *Pueblo* Land Office, Colorado.

*To the Register and Receiver of said United States Land Office:

Your protestant, *C. H. Aldrich*, whose postoffice address is *Chicago, Illinois*, a citizen of the United States over the age of twenty-one years, hereby respectfully protests against the entry by, and issuance of patent to, *The Anaconda Mining Company*, on their so-called mill site styled the *Martha Becker* Mill Site, Survey Lot No. 930 B, situate in *Cripple Creek* mining district, County of *Teller*, State of Colorado. Because:

1. The said so-called mill site is not and never was used or occupied in connection with the said *Martha Becker* lode for mining or milling purposes.

2. It is not and never was used or occupied by the applicant or its grantors in connection with any lode or by itself for mining or milling purposes.

3. There are no improvements and never have been any improvements upon said mill site except the improvements made by your protestant.

4. The said mill site is below the mill and below the tailrace of the mill of the said applicant company, and has never been and is not now parcel of nor appurtenant to said mill, nor included within the mill site on which said mill stands.

5. Said so-called mill site or a great part thereof, the conflicting area being shown by the plat hereto attached duly certified (see p. 603), was in good faith located as the Lion Mill Site by your protestant in the year 1897, and long prior to the said application and is now being used for mining purposes in connection with the *Lion* lode, lying immediately above the said mill site, owned and being worked by your protestant.

(6, etc.; 7, etc.) Add or substitute other reasons according to the facts, *e. g.*—the publication was not posted on the Land Office Bulletin during the period of newspaper publication—the location of said mill site is on mineral land and land more valuable for mineral than for mill site purposes—etc.

Wherefore for these causes as verified by the affidavit of your protestant attached hereto, and as well for the want of proper proof that

*In the General Land Office the address is "To The Honorable the Commissioner of the General Land Office." In the Department "To The Honorable the Secretary of the Interior."

the said so-called *Martha Becker* Mill Site is being "used or occupied by the proprietor of the said *Martha Becker* lode for mining or milling purposes," as required by the terms of section 2337 of the Revised Statutes of the United States, and that the applicant has otherwise failed to comply with the terms of Chapter 6 of Title XXXII of said Revised Statutes, entitled "Mineral Lands and Mining Resources," your petitioner protests as aforesaid. C. H. ALDRICH.

LAWRENCE LEWIS, Denver,
Attorney for Protestant.

STATE OF COLORADO, } ss.
County of *Teller*. }

Before me, the subscriber, *E. H. Gruber*, a Notary Public in and for said County, personally appeared *C. H. Aldrich*, who, being duly sworn, saith that he is the protestant named in the foregoing protest subscribed by him; that he has read the same and knows the contents thereof, and that the same and the matters and things therein stated are true.

C. H. ALDRICH.

Sworn and subscribed before me this 10th day of *January*, A. D. 1916.
My commission expires Dec. 27, 1919.
[SEAL] E. H. GRUBER,
Notary Public.

Land Office Jurisdiction.

Until by entry title passes out of the United States, the land office has jurisdiction of or supervision over contests between claimants.—*Plested v. Abbey*, 228 U. S. 42, 33 Sup. Ct. Rep. 503, 57 L. Ed. 724.

Courts are not bound by action of the General Land Office on *ex parte* proofs.—*Milner v. U. S.*, 228 F. 431.

The land office will take notice of a protest against an application for patent in considering a second application to the same ground.—44 L. D. 125.

TIDE LANDS.

Minerals lying between high and low tide, as well as under the sea, in a Territory, belong to the national government, but they are not considered part of the public domain open to the settler or occupant under any form of entry. Upon admission of the Territory this sovereignty passes to the State government.—29 L. D. 396; *Shively v. Bowlby,* 152 U. S. 1, 14 Sup. Ct. Rep. 548, 38 L. Ed. 331.

The boring for oil may be enjoined at the suit of the frontage owner as an invasion of his right of access to the ocean.—*San Francisco Union v. R. G. R. Co.,* 144 Cal. 134, 103 Am. St. Rep. 72, 1 Ann. Cas. 182, 66 L. R. A. 242, 77 P. 823.

By the Alaska Act the tide lands of Bering Sea are opened to exploration and mining to wit: The lands between high and low tide, under miners' rules, and the lands below low tide under rules to be prescribed by the Secretary of War. Such latter rules are limited to "the preservation of order and the protection of the interest of commerce" and we see no reason why the rules generally of a district on the beach should not extend to ground below the tide on all points not covered by the Secretary's rules.

The act contemplates only the temporary working of this class of claims, not providing for patent to issue at any period. Except as to patenting, the U. S. Mining Acts are extended to them, so far as applicable.—Comp. Laws, 1913, Sec. 129.

At other points, on shore of either State or Territory, mining by the first occupant is a trespass as against the government, but no third party has the right to complain.

The rights of parties mining on such premises depend on priority of possession, and those rules of law which govern that class of cases where the real owner is not asserting his title but allows to third parties the present enjoyment of the use, by sufferance.

ALASKA.

Titles Prior to 1900.

From 1884 to 1900 (23 St. L. 24) the laws of Oregon so far as they covered the subject were in force. Those statutes only required a location notice and record and forbade more than one location by the same person on the same lode. The universal terms of Sec. 2324 of course applied. And all possessory claims prior to 1884 were validated by the act of that year.—*Bennett v. Harkrader*, 158 U. S. 443, 15 Sup. Ct. Rep. 863, 39 L. Ed. 1046, 18 M. R. 224.

From 1900 to 1912.

By A. C. of June 6, 1900, 31 Stat. L. 321, three recording divisions were created, the act fixing their boundaries. These recording divisions were subdivided into recording districts. The act provided for record of mining claims and for the recognition of district rules allowing 90 days after discovery for record but not giving details of location.

Special Legislation — Placers — Annual Labor — Adverse Claims—Mechanics' Liens.

Alaska was created a Territory by A. C. approved August 24, 1912, 37 Stat. L. 512. Being the only continental Territory, it has been subjected to many acts not applicable elsewhere.

By A. C. of March 2, 1907, 34 Stat. L. 1243, a special annual labor act was passed, the notable feature of which is that the labor is compulsory, with no right of resumption as allowed elsewhere.—*Thatcher v. Brown*, 190 F. 708, 111 C. C. A. 436; *Ebner Co. v. Alaska Co.*, 210 F. 599, 127 C. C. A. 235.

Annual labor for 1913 on Seward Peninsula was condoned under certain conditions.—38 Stat. L. 235.

On account of the immensity of its distances it has been most justly allowed a longer time to file adverse claims and to bring the supporting suit. This time is eight months to file

and 60 days after filing the adverse claim, is the period to bring the suit.—36 Stat. L. 459.

It has a special mechanics' lien law.—36 Stat. L. 848.

Indians.

Right of Indians to occupy and alienate land.—*Worthen Co. v. Alaska Co.*, 229 F. 966.

Tide lands are declared open to exploration for mining purposes with the right to dredge below low tide.—Comp. Laws of 1913, Sec. 129.

Mining Acts.

In 1913 the Territorial Legislature passed a general mining act which was repealed in 1915 when the act now in force was adopted, the material requirements of which as to lode claims are found on page 69, and as to placers on page 272.

The full text of the A. C. of August 1, 1912, 37 Stat. L. 242, especially relating to placer claims and agency locations, which was re-enacted as a Territorial law as Secs. 129a-129e of the Alaska Laws of 1915, reads as follows:

40-Acre Placer Limit—Annual Labor.

Sec. 129A. That no association placer mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

Agency Locations.

Sec. 129B. That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or per-

mitted to locate more than two placer mining claims for any one principal or association during any calendar month, and no placer mining claim shall hereafter be located in Alaska except under the limitations of this Act. See *Sutherland v. Purdy*, 234 F. 600.

Monthly Limitation.

Sec. 129C. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer mining claims in any calendar month; *Provided*, That one or both of such locations may be included in an association claim.

Width of Claim.

Sec. 129D. That no placer mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

Act Mandatory.

Sec. 129E. That any placer mining claim attempted to be located in violation of this Act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

In conformity to the terms of the A. C. of March 2, 1907, 34 Stat. L. 1243, Comp. Laws of 1913, Sec. 162, the Territorial Legislature describes the details of affidavit of annual labor as follows:

Affidavit of Annual Labor.

In order to hold a claim or claims after the annual assessment work has been done thereon, the owner of such claim or claims, or some other person having knowledge of the facts, shall make and file an affidavit of the performance of such assessment work with the recorder of the district in which such claim or claims is or are located, not later than ninety days after the close of the calendar year in which such work was done, or the improvements made, which affidavit shall set forth the following:

(a) The name and number of the claim and where situated.

(b) The number of the days' work and the character and value of the improvements made thereon.

(c) The date of the performance of such labor and the making of such improvements.

(d) The place where such work was done and improvements made with reference to the boundaries of such claim.

(e) At whose instance the work was done and improvements made.

(f) The actual amount paid for such work and improvements and by whom paid, when such work was not done or improvements made by the owner.

The failure to file for record the proof of assessment work as herein provided shall be deemed an abandonment of the location and the claim shall be subject to relocation by any other person, provided, however, that a compliance with the provisions of this section before any relocation shall operate to save the rights of the original locator, and further provided, that if said placer claim or claims have not been relocated by any other person or persons within one year after such forfeiture, the last locator, claimant or owner of such forfeited claim may return to said forfeited claim or claims and relocate the same as though the same had never been located.—Act of 1915, Sec. 7.

Decisions.

The record of the power of attorney in Alaska is in time if made before adverse rights accrue.—*Cloninger v. Finlaison*, 230 F. 98.

A lease is a conveyance under the Alaska recording act.—*Waskey v. Chambers*, 224 U. S. 564, Ann. Cas. 1913D, 998, 32 Sup. Ct. Rep. 597, 56 L. Ed. 885, reversing *Eadie v. Chambers*, 172 F. 73, 18 Ann. Cas. 1096, 24 L. R. A. (N. S.) 879, 96 C. C. A. 561.

Coal Lands.

The general coal lands sections were extended to Alaska by A. C. June 6, 1900, 31 Stat. L. 658. By A. C. April 28, 1904, 33 Stat. L. 525, this general law was specialized for Alaska, the act providing for limited entries and for publication and adverse claims in form somewhat similar to adverse claim proceedings on a lode application. This was followed by Act of May 25, 1908, 35 Stat. L. 424, attempting to give to the United States a preferential right to purchase the coal.

But the act approved October 20, 1914, 38 Stat. L. 741, revolutionizes the procedure to obtain title to coal lands in the Territory.

Its first section provides for an official survey of the coal lands and its second section calls for extensive reservations for government use and for the navy.

By sections 3-6 lands not reserved are to be divided into blocks for leasing, and further clauses provide for a schedule of regulations by the Secretary of the Interior.

The act practically denies all rights to the prospector and even the privilege to lease becomes accessible only to those with unlimited means to retain counsel and obtain recognition by the department.

Any further analysis of its provisions is entirely beyond the scope of this work.

Discovery of an outcrop of coal in Alaska is not an improvement under the Act of 1904.—43 L. D. 305. And prospecting is not equivalent to discovery.—45 L. D. 56, 65.

PHILIPPINE ISLANDS.

An extremely detailed and complicated mining code for the Philippines is contained in the Act of July 1, 1902, providing a temporary government for those islands.—32 St. L. 697. Materially amended Feb. 6, 1905.—33 St. L. 692.

Reavis v. Fianza is a decision under these acts protecting the native title to mines worked by them by long continued possession alone.—215 U. S. 16, 30 Sup. Ct. Rep. 1, 54 L. Ed. 72.

TEXT OF U. S. STATUTES REPEALED.

Sections of Act of July 26, 1866, Repealed by Act of May 10, 1872, and Not Found in the Revised Statutes.

Original License to Explore.

Sec. 1.—That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as

may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

Improvements—Dip—Patent.

Sec. 2.—That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

Application for Patent.

Sec. 3.—That upon the filing of the diagram as provided in the second section of this Act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the Surveyor General, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

Form of Survey—Length of Claim.

Sec. 4.—That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid, and the surveyor general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners; *Provided*, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.—See page 12.

Adverse Claims.

Sec. 6.—That whenever any adverse claimants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this Act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.—14 St. L. 251.

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*FULL TEXT OF UNITED STATES LAWS NOW IN FORCE.

The text is taken from the Revised Statutes of the United States, the Compiled Laws, and the Statutes at Large to the first session of the Sixty-fourth Congress, 1916. This revision includes the unrepealed sections of

An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes.—*Approved July* 26, 1866.

An Act to amend an Act granting the right of way to ditch and canal owners over the public lands, and for other purposes.—*Approved July* 9, 1870.

An Act to promote the development of the mining resources of the United States.—*Approved May* 10, 1872.

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*In 44 L. D., commencing at p. 247, is found a reprint of all the Mining Acts to August 6, 1915.

Commonly called the "Mining Acts," with all their amendments, and miscellaneous sections from other acts.

The sections of the Act of 1866, repealed by the Act of 1872, are printed, *ante* p. 638.

TITLE XIII, CHAPTER SEVENTEEN.

Possessory Actions.

Sec. 910.—No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.—Sec. 9, Feb. 27, 1865. See p. 6.

TITLE XXXII, CHAPTER SIX.
ENTITLED "MINERAL LANDS AND MINING RESOURCES."

Reserved from Sale Under the Pre-Emption Acts.

Sec. 2318.—In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.—Sec. 5, July 4, 1866.

General License.

Sec. 2319.—All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.—Sec. 1, May 10, 1872. See p. 6.

District Rules

Length of Claims.

Sec. 2320.—Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet

Discovery Essential. Width of Claims.

on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.—Sec. 2, May 10, 1872. See pp. 18, 22.

Proof of Citizenship.

Sec. 2321.—Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.—Sec. 7, May 10, 1872. See p. 564.

Citizenship of Corporations.

Surface—Dip and Side Veins.

Sec. 2322.—The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.—Sec. 3, May 10, 1872. See pp. 191, 202.

Top or Apex Controls.

Surface.

Tunnels.

Sec. 2323.—Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.—Sec. 4, May 10, 1872. See p. 311.

District Rules.

Sec. 2324.—The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements:

Location, Record. The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor,

Annual Labor. not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after

Forfeiture. failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year,

give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.—Sec. 5, May 10, 1872. See pp 84, 114, 142.

Amendment of 1875—Labor by Tunnel.

That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.—Sec. 1, Feb. 11, 1875. Comp. Laws, p. 1427. See page 319.

Amendment of 1880—Annual Labor Period Fixed.

That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."—Sec. 2, January 22, 1880. Comp L. p. 1427. See p. 114.

Application for Patent.

Sec. 2325.—A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent,

in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States Surveyor General that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.—Sec. 6, May 10, 1872. See APPLICATION FOR PATENT, p. 540.

60 Days' Publication.

$500 Improvements.

Adverse Claim.

$5 per Acre.

Application by Non-Residents.

That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided,* That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits;

"*And provided,* That this section shall apply to all applications now pending for patents to mineral lands."—Sec. 1, January 22, 1880. Comp. L. p. 1429. See page 578.

Adverse Claims.

Sec. 2326.—Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a Court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a Court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the Surveyor General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the Court, to rightly possess. If it appears from the decision of the Court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor General, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever.—Sec. 7, May 10, 1872. See p. 599.

Suit Supporting in 30 Days.

Proceedings After Judgment.

Title in Neither Party.

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office, or be entitled to a patent for the ground in controversy until he shall have perfected his title.—March 3, 1881. Comp. L. p. 1431. See p. 624.

Adverse by Agent for Non-Residents.

That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any Court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.—Sec. 1, April 26, 1882. Comp. L. p. 1431.

Affidavits Out of Land District.

That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any Court of record or before any notary public of any State or Territory.—Sec. 2, *Id.* Comp. L. p. 1425.

Survey Amendment of 1904.

*Sec. 2327.—The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the Surveyors General, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and Surveyors General in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest

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Section 2327 Prior to Amendment.

*Sec. 2327.—The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the Surveyor General, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.—Sec. 8, May 10, 1872.

authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give away thereto.—April 28, 1904. 33 St. L. 545.

Previous Applications.

Sec. 2328.—Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.—Sec. 9, May 10, 1872. See p. 190.

Adverse Rights Excepted.

Placers Open to Entry.

Sec. 2329.—Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.—Sec. 12, July 9, 1870. See p. 257.

Oil Placer Act.

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims; *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.—Feb. 11, 1897. 29 St. L. 526. See p. 686.

Annual Labor on Oil Claims.—See p. 142.

Saline Placer Act.

That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims: *Provided*, That the

same person shall not locate or enter more than one claim hereunder.—Jan. 31, 1901. 31 St. L. 745. See p. 261.

Legal Subdivision of Placers.

Sec. 2330.—Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.—Sec. 12, July 9, 1870. See p. 257.

160 Acre Placers.

Placers on Surveyed Lands.

Sec. 2331.—Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.—Sec. 10, May 10, 1872. See p. 257.

Limitations.

Sec. 2332.—Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.—Sec. 13, July 9, 1870. See pp. 323, 477.

Liens.

Placer Claim Containing Lode.

Sec. 2333.—Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.—Sec. 11, May 10, 1872. See p. 280.

Placers $2.50 per Acre.

Deputy Surveyor and Fees.

Sec. 2334.—The Surveyor General of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and receiver of the land office, which statement shall be transmitted, with the other papers in

Charges for Publication.

the case, to the Commissioner of the General Land Office.—Sec. 12, May 10, 1872. See p. 514.

Affidavits and Proofs.

Sec. 2335.—All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.—Sec. 13, May 10, 1872. See p. 516.

Agricultural Contest.

Cross Veins.

Sec. 2336.—Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.—Sec. 14, May 10, 1872. See pp. 185, 188.

Veins Uniting on the Dip.

Mill Sites.

Sec. 2337.—Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.—Sec. 15, May 10, 1872. See p. 294.

Easements.

Sec. 2338.—As a condition of sale, in the absence of necessary legislation by Congress, the local Legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, and those conditions shall be fully expressed in the patent.—Sec. 5, July 26, 1866. See p. 243.

Water Rights—Appropriation.

Sec. 2339.—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.—Sec. 9, July 26, 1866. See p. 233.

Patents Subject to Water Easements.

Sec. 2340.—All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water right, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.—Sec. 17, July 9, 1870. See p. 234.

Homesteads.

Sec. 2341.—Wherever, upon lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "HOMESTEADS."—Sec. 10, July 26, 1866.

Segregation of Agricultural Lands.

Sec. 2342.—Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.—Sec. 11, July 26, 1866.

Land Districts.

Sec. 2343.—The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.—Sec. 7, July 26, 1866.

Building Stone Act.

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.—*A. C. Aug. 4, 1892.—27 Stat. L. 348.*

Sec. 2344.—Saving Clause as to Sutro Tunnel Act.

Sec. 2345.—Excepts Michigan, Wisconsin and Minnesota.*

State and Railroad Grants.

Sec. 2346.—No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grants.—Res. No. 10, January 30, 1865.

Rights of Canadians in Alaska.

Sec. 13.—That native-born citizens of the Dominion of Canada shall be accorded in said District of Alaska the same mining rights and privi-

*By Act of May 5, 1876, Missouri and Kansas are excepted from the operation of the Mining Act. By Act of March 3, 1883, Alabama is excepted.

leges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said District of Alaska; and the Secretary of the Interior shall from time to time, promulgate and enforce rules and regulations to carry this provision into effect.—Approved May 14, 1898. 30 St. L. 415. See Rule 112, p. 523.

Return of Excess Payments by Surveyor General.

That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of the moneys heretofore or hereafter covered into the treasury from deposits made by individuals to cover cost of work performed and to be performed in the offices of the United States Surveyors General in connection with the survey of mineral lands, any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made or the whole of any unused deposit; and such sums, as the several cases may be, shall be deemed to be annually and permanently appropriated for that purpose. Such repayments shall be made to the person or persons who made the several deposits, or to his or their legal representatives, after the completion or abandonment of the work for which the deposits were made, and upon an account certified by the Surveyor General of the district in which the mineral land surveyed, or sought to be surveyed is situated and approved by the Commissioner of the General Land Office.—Approved Feb. 24, 1909. 35 St. L. 645.

When a military reservation is vacated the mineral lands become part of the public domain.—A. C. July 5, 1884, 23 St. L. 103.

COAL LANDS.

Legal Subdivisions.

Sec. 2347.—Every person above the age of twenty-one years, who is a citizen of the United States or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such land, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.—Sec. 1, March 3, 1873.

160 or 320 Acres $10 to $20 per Acre.

Settlers Preferred.

Sec. 2348.—Any person or association of persons severally qualified as above provided, who have opened and improved or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.—Sec. 2, *Id.*

640 Acre Tracts.

Land Office Proceedings.

Sec. 2349.—All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvenent, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.—Sec. 3, *Id.*

Entry Limited.

Sec. 2350.—The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.—Sec. 4, *Id.*

A corporation having purchased lands previously patented has not "taken the benefit" as those words are used in this section so as to prevent its stockholders entering other lands. —*Northern Colo. Co. v. U. S.*, 234 F. 34.

Conflicting Claims.

Sec. 2351.—In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.—Sec. 5, *Id.*

Vested Rights—Lodes and Placers Excepted.

Sec. 2352.—Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.—Sec. 6, *Id.*

The department holds that the sections above printed only fix the minimum per acre and that it may arbitrarily increase the price without limit.—40 L. D. 610.

Coal lands are classified as to prices by grade of the fuel and size of veins by 37 L. D. 653, 681, and 38 L. D. 181.

A special survey of township containing coal lands is provided for by 28 St. L. 423.

Coal lands are mineral lands which it has been the policy of the government to reserve out of railroad grants.—*United States v. N. Pac. Ry.*, 170 F. 498.

A party prospecting for coal on U. S. land has the right to mine and sell the coal and is not a trespasser.—*Ghost v. United States*, 168 F. 841, 94 C. C. A. 253.

Where coal is discovered on land after selection by an agricultural claimant but before his rights become vested he may go to patent for the surface, the government reserving the coal. —35 Stat. L. 844. For circulars to this act see 37 L. D. 528, 38 L. D. 183.

Coal lands are mineral and title can not be acquired under the Homestead Act.—*Washington Co. v. United States*, 194 F. 59, 114 C. C. A. 79, 234 U. S. 76, 34 Sup. Ct. Rep. 725, 50 L. Ed. 1220. But the homestead entry is valid where there was not full proof of coal value. Even outcrops are not absolute proof.—*United States v. Kostelak*, 207 F. 447. But outcrops were considered, and even general reputation, in *United States v. Diamond Co.*, 191 F. 786, 112 C. C. A. 272; *Diamond Co. v. United States*, 233 U. S. 236, 34 Sup. Ct. Rep. 507, 58 L. Ed. 936; *Milner v. United States*, 228 F. 431.

The geological formation and surface indications and neighboring discoveries are all to be considered in determining the fact of coal value.—41 L. D. 639.

Land office procedure in coal land entries considered with relation to valuation and failure to make prompt proof and payment.—41 L. D. 661.

The latest land office regulations under the Coal Act are found in 35 L. D. 665, 684, 36 L. D. 192, 318, 368, 41 L. D. 416, 42 L. D. 170.

Reaching coal by instroke from adjoining colliery is opening and improving within the meaning of the coal land law.—41 L. D. 21.

A second coal filing by the same party may be made where the failure to perfect the first is sufficiently excused.—41 L. D. 337. Otherwise when no such excuse is proved.—41 L. D. 177.

Severance of Surface and Coal Title.

By A. C. of March 3, 1909, it was enacted that coal lands could be entered by an agricultural claimant, his entry to reserve the coal to the United States.—35 Stat. L. 844. This was supplemented by A. C. of June 22, 1910, 36 Stat. L. 583.

The coal claimant can enter upon such land upon giving bond approved by the Secretary of the Interior.

Under these acts a severance of title takes place, one owning the surface and another the coal, and applications for each title may apparently proceed at the same time. In 36 L. D. 179 is found an attempt of the land office to formulate procedure under the acts.

Patents for coal lands obtained by a fraudulent combination to obtain more land than the government allows to a single section, or where coal lands have been patented as a homestead will be set aside. And corporations composed largely of the guilty parties taking title are not innocent purchasers.—*United States v. Allen*, 180 F. 855; *Washington Co. v. United States*, 194 F. 59, 114 C. C. A. 79; *Wilson Co. v. United States*, 188 F. 545, 110 C. C. A. 343.

TIMBER AND STONE ACT.

Lands Chiefly Valuable for Timber or Stone.

That surveyed public lands of the United States within the *public land States*, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands.

Mining Claims Excepted.

Provided, That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes. (A further proviso follows saving ditch and water rights.) Sec. 1, Act of June 3, 1878, amended August 4, 1892. Comp. Laws p. 1545, 20 St. L. 89, 27 St. L. 348.

Duplicate Statements Required.

Sec. 2.—That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated.*

Sale to Bona Fide Purchaser.

And if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same;

And any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.—Sec. 2, *Id.*

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*An Act of 1904, 33 St. L. 59, makes special provision for verification of the forms under the act and making proofs outside the land district.

Publication.

Sec. 3.—That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time.

Proofs.

And after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal;

Right to Enter.

And upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon.

Protest and Appeal.

Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases.

Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office. —Sec. 3, *Id.*

The original act was confined to certain States, and the above act is the law as it now reads extended to all "public land" States. Unsurveyed lands can not be entered under this act. —36 L. D. 268.

The procedure is governed by regulations of the department, January 2, 1914, found in 43 L. D. 37. The regulations require the filing of duplicate statements, as prescribed in the second section of the act. The statement must also show the applicant's belief as to the value of the land and his estimate, and value of the timber. A fee of $10 must accompany the application. The land is then appraised by an employee of the government, and a notice of the appraised value is given to the applicant, who must within 30 days after notice pay to the register and receiver, such appraised value. Advertisement and posting for 60 days are done as required by the third section, and at the completion of the 60 days, proof of publication is filed, and the applicant makes final proof, by himself and two witnesses at the land office, or before the officer before whom it is to be offered, that the land is of the character in detail as described in the above first section, whereupon final entry is allowed and patent issues in due time.

Provision is also made that if the applicant is not satisfied with the appraisement, he may, at his own expense, have the land re-appraised by a government officer.

If the land department fails to appraise the land within nine months from the date of application, the applicant may within thirty days deposit the amount named in his application as the value of the land and timber, and thereupon proceed with his application as though appraisement had been made.

The same procedure applies to applications for land chiefly valuable for stone. Blanks and instructions for such entries are furnished on request by any local land office.

The meaning of the phrase in section 2 "That he does not apply to purchase the same on speculation," is construed in *United States v. Budd*, 144 U. S. 154, 12 Sup. Ct. Rep. 575, 36 L. Ed. 384; *United States v. Detroit L. Co.*, 200 U. S. 321, 26 Sup. Ct. Rep. 282, 50 L. Ed. 499; *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. Rep. 986, 44 L. Ed. 1157, 42 L. D. 440.

An entry made in good faith, though with the expectation of profiting by a sale of the land, is not a "speculation."—32 L. D. 349.

Until final proof and payment are made the land may be withdrawn under the reclamation act.—36 L. D. 18.

The Land Department has repeatedly held that the affidavit required must be based upon personal examination of the land. —32 L. D. 606, *Id.* 631, 40 L. D. 85, 42 L. D. 437, and in 37 L. D. 582 is printed the case *In re Ness* by the Court of Appeals of the District of Columbia to the same effect, but the case of *Robnett v. United States,* 169 F. 778, 95 C. C. A. 244, holds distinctly to the contrary.

The purchase money may be borrowed and secured by mortgage on the land.—34 L. D. 133. But no mortgage or conveyance should be made before entry and payment as the department may require a non-alienation affidavit at any time before receiver's receipt issues.

In a contest between a timber entry and an agricultural claim the former must show that the land, as a whole, is substantially unfit for cultivation.—35 L. D. 498.

The fact that the land will be fit for cultivation after the timber is removed does not exclude it from entry under the timber act.—*United States v. Budd,* 144 U. S. 154, 12 Sup. Ct. Rep. 575, 36 L. Ed. 384; *Thayer v. Spratt,* 189 U. S. 346, 23 Sup. Ct. Rep. 576, 47 L. Ed. 845.

Abandoned improvements will not exclude land from entry under the Timber and Stone Act.—38 L. D. 335.

A legal subdivision found to be not within the Timber and Stone Act may be cut out even after entry.—39 L. D. 359.

Land covered with timber suitable for mining uses is within the act.—39 L. D. 577. Otherwise as to scrub timber.—44 L. D. 129.

Scope of evidence admissible in trial of conspiracy case for taking up land under the Timber and Stone Act.—*Van Gesner v. United States,* 153 F. 46, 82 C. C. A. 180. The act is further construed in *United States v. Biggs,* 211 U. S. 507, 29 Sup. Ct. Rep. 181, 53 L. Ed. 305; *United States v. Sullenberger,* 211 U. S. 522, 29 Sup. Ct. Rep. 186, 53 L. Ed. 311; *United States v. Freeman,* 211 U. S. 525, 29 Sup. Ct. Rep. 185, 53 L. Ed. 311.

The decision of the Land Department that lands are subject to entry under the Timber and Stone Act is final.—*United States v. Primrose Co.*, 216 U. S. 553.

Where coal is found to underlie a timber and stone entry, the applicant must accept a surface patent.—44 L. D. 48.

Timber entries are not within the operation of section 7 of the Act of March 3, 1891, providing that after two years from date of entry, patent shall issue where there is no pending contest; and the Secretary of the Interior can not be compelled by *mandamus* to issue a timber and stone patent.—37 L. D. 564.

The filing of one application exhausts applicant's rights.—37 L. D. 145. But otherwise when there was good excuse for not perfecting the first application.—44 L. D. 539.

If he die before final proof his heirs can not perfect the application.—37 L. D. 161.

If the applicant die after proof, patent issues to his heirs generally.—36 L. D. 248.

See Building Stone Act, p. 653.

TIMBER ON MINERAL LANDS.

Timber Free to Miners.

That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.—June 3, 1878. 20 St. L. 88.

The above printed act and Act of 1881, 26 Stat. L. 1093, allows the department to restrict the right by regulations.—42 L. D. 30, *Id.* 22, *Id.* 163.

The right to cut timber under the Act of June 3, 1878, 20 Stat. L. 88, is confined to lands valuable for minerals, strictly construed, and does not apply to adjoining lands.—*United States v. Plowman,* 216 U. S. 372, 30 Sup. Ct. Rep. 299, 54 L. Ed. 523. Overruling the prior case of *United States v. Basic Co.,* 121 F. 504, 57 C. C. A. 624, to the contrary.

A foreign corporation is not a "resident" authorized to cut timber.—39 L. D. 80.

The above is the act now in force. The Acts of 1891 and 1893, 26 St. L. 1093, 27 *Id.* 244, are a repetition of its provisions as to certain States and Territories. The acts are construed by circulars found in 29 L. D. 571, 572, 36 L. D. 73, and 37 L. D. 492, superseding all prior regulations. The Act of 1878 is reprinted in 44 L. D. 257.

These circulars contain the "regulations" mentioned in the act which are material, because the burden of proof is on the timber cutter to show compliance with them.—*United States v. Basic Co.,* 121 F. 504, 57 C. C. A. 624.

Under the act above printed timber may be cut on mineral lands for purposes of sale or for roasting ores—nor can the Secretary by regulation prohibit cutting for such purposes.—*United States v. Rossi,* 133 F. 380, 66 C. C. A. 442; *United States v. United Verde Co.,* 196 U. S. 207, 25 Sup. Ct. Rep. 222, 49 L. Ed. 449.

Using timber for smelting purposes is within the terms of the Act of 1891.—34 L. D. 78. Also for constructing electric light plants, bridges and flumes by city or county.—*Id.* 112.

Proof of panning colors is not enough to prove that the land is mineral so as to justify timber cutting.—*Anderson v. United States,* 152 F. 87, 81 C. C. A. 311. A purchaser of timber cut by trespass can not defend on his good faith. He can not have a better title than his vendor.—*Id.*

The department formerly held that the above act applied to all "mineral districts."—29 L. D. 349. But in view of the decisions in *United States v. Smith,* 11 F. 487, 8 Sawy. 100; *United States v. Benjamin,* 21 F. 285; *United States v. Eng-*

lish, 107 F. 867, and *United States v. Price Co.*, 109 F. 239, 48 C. C. A. 331, which hold to the contrary, it now rules that the act does not apply to any State or Territory not specifically mentioned.—38 L. D. 75.

The timber on government mineral land is free to all citizens for any proper purpose and the mineral character may be established without the existence of a paying mine. And even if such character is not proved, a party cutting timber in good faith is liable only for stumpage value.—*Morgan v. United States*, 169 F. 242, 94 C. C. A. 518.

Messinger made a homestead entry on which he cut mining timber. After he had sold the stulls, he abandoned the entry, which defendant alleged had been made on mineral land. Defendant was held for full value of the stulls. This seems a hard case, both as to the measure of damages and as to the original alleged trespass.—*Bunker Hill Co. v. United States*, 226 U. S. 548, 33 Sup. Ct. Rep. 138, 57 L. Ed. 345. In 40 L. D. 518 and 43 L. D. 106 a more moderate rule was applied.

Alaska.

Section 11, Act of 1898, 30 St. L. 414, allows free use of timber to miners in Alaska.

OIL AND GAS.

The peculiar physical properties of these substances have led to decisions concerning their relations to asserted ownership and possession which form a department of law unique in character, interesting to the student, and important to the proprietor.

There is no ancient law on the subject. They were unknown in the United States except as natural curiosities until the first oil well was sunk at Titusville, Pennsylvania, in 1859. Natural gas began to be used in place of artificial coal gas in 1872 at

Fairview, Pennsylvania. The first pipe line was built in 1886 to Pittsburg.

Since these first commercial beginnings both substances have been found in immense quantities over wide areas extending from New York to California, and from the Dominion to Mexico. There are breaks in the continuity of the districts and they are broadly distributed into "fields," some of them of very large area, with considerable dissimilarity in their geological deposition.

Petroleum is the only mineral which is essentially a liquid, and not a solid. Quicksilver, it is true, at ordinary temperatures is a liquid, but it is not found in nature in that form. Mineral water is a liquid, but such water if a mineral at all is probably only to be so classed under peculiar circumstances, as where parties dealing with it have treated it as such.

Natural gas, as its name necessitates, is matter in form neither liquid nor solid, and is doubtless only petroleum advanced to an aerified form, though the relation between the liquid and the gas is a matter upon which scientific men are not wholly agreed. Certainly they are so closely associated that some family relationship between them can not be denied. An analogous instance, but not a perfect analogy, is the mineral "salt," where the owner on sinking might strike a layer of rock-salt, or he might find a stratum impregnated with water, which he would have only to bring to surface to get the same value by evaporation.

Are Land and Minerals.

That both gas and oil are minerals has been almost uniformly decided by all Courts where the question has arisen, usually in the instance of the construction of a deed reserving "all minerals."—*Murray v. Allred,* 100 Tenn. 100, 66 Am. St. Rep. 740, 39 L. R. A. 249, 43 S. W. 355, 19 M. R. 169; *Poe v. Ulrey,* 233 Ill. 56, 84 N. E. 46; *In re Buffalo N. G. Co.,* 73 F. 191.

But there are rulings to the contrary in Ohio and Kentucky, and especially in Pennsylvania.—*Detlor v. Holland,* 57 Ohio

St. 492, 40 L. R. A. 266, 49 N. E. 690; *McKinney Heirs v. Central Ky. Co.*, 134 Ky. 239, 20 Ann. Cas. 934, 120 S. W. 314; *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696; *Preston v. South Penn. Co.*, 238 Pa. 301, 86 Atl. 203.

Petroleum and natural gas are "land."—*Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533.

Petroleum is a mineral and as such oil lands do not pass in a railroad grant.—*Burke v. Southern Pac. R. R. Co.*, 234 U. S. 669, 34 Sup. Ct. Rep. 907, 58 L. Ed. 1527.

The fact that these minerals are liquid or gaseous, that is: Will flow like water to fill a vacuum or find a level, the oil sinking and the gas rising, has suggested the comparison of such substances to game or animals *ferae naturae*, which today are found on my land, and tomorrow may have crossed the line to the land of my neighbor. If the owner finds the game on his land and kills it, then and only then, it becomes his absolute property. Following up the analogy came its application to the case of these fugitive minerals, and it now seems to be the settled law. Beginning possibly with the case of *Westmoreland Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731, it has been followed in an unlimited number of decisions, so that it is not now in a position to be questioned.

Deducing propositions of law from fanciful comparisons and analogies is always dangerous, and while we must accept the conclusions now reached, it seems certain that the Courts, which first started upon this departure, never foresaw the startling consequences which have been found to follow upon the application of the doctrine to the many varied instances where it has been applied.

The alleged reason for this: the fugitive nature of liquid and gaseous minerals—assumes a peculiar phase in the attempt to carry it further by legislation forbidding the pumping of mineral waters.—*Hathorn v. Natural C. G. Co.*, 128 App. Div. 33, 112 N. Y. Supp. 374, 60 Misc. Rep. 341, 113 N. Y. Supp. 458, 194 N. Y. 326, 128 Am. St. Rep. 555, 16 Ann. Cas. 989, 23 L. R. A. (N. S.) 436, 87 N. E. 504; *Lindsley v. Natural C. G.*

Co., 162 F. 954, 170 F. 1023, 220 U. S. 61, 31 Sup. Ct. Rep. 337, 55 L. Ed. 369.

We will endeavor to consider some of these applications under the subdivisions which naturally suggest themselves.

No Estate in the Oil or Gas Until Found.

The first proposition to which this line of reasoning led was that neither the owner of the surface nor his lessee has any title to the oil or gas under the land until it is found, or found and brought to surface. So far as the idle owner is concerned this is of no practical importance, and when he sells the land his grantee succeeds to his rights, including his right to find and sever the oil and gas.

But to the lessee or operating owner it is of great materiality, for he is now searching for the oil, but has no ownership in it until he taps or finds it. Adjoining lessees are in the same position, and whoever is first to find it gets the benefit not only of what was originally under his ground, but all that flows in to fill the vacuum made by his extraction of it.

The lessee has no estate in the oil or gas until actually discovered in his well.—*McNish v. Stone*, 17 M. R. 22, 152 Pa. 457, note; *Venture Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, 17 M. R. 543; *Florence Co. v. Orman*, 19 Colo. App. 79, 73 P. 628; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 19 M. R. 315, 29 S. E. 978; *Kolachny v. Galbreath*, 26 Okla. 772, 110 P. 902, 38 L. R. A. (N. S.) 451; *Rawlings v. Armel*, 70 Kan. 778, 79 P. 683.

No present interest passes under an oil and gas lease until mineral is found.—*Beardsley v. Kan. N. G. Co.*, 78 Kan. 571, 96 P. 859.

As a necessary sequence to this ruling it is held that an oil lessee can not maintain ejectment upon his papers giving apparently the same right which a farm tenant would have to bring such action, barring the case where he has been placed in actual possession of the surface and been ousted therefrom. —*Kelly v. Keys*, 213 Pa. 295, 62 Atl. 911, 110 Am. St. Rep. 547; *Kolachny v. Galbreath, supra.*

Lessee who has never been in possession can not maintain ejectment. No title vests until oil or gas is found.—*Priddy v. Thomas*, 204 F. 955, 123 C. C. A. 277.

But a lease may be in such form that it is a lease "of the land itself," being more than an ordinary "oil lease," and discovery of oil in such case is not essential.—*Kline v. Guaranty O. Co.*, 167 Cal. 476, 140 P. 1.

Right to Pump or Force.

If the owner of land has the right to place bait to lure the game to cross the line onto his land (if this plan of reasoning by analogy is to be followed), then the owner of oil land has the right to use artificial means to induce the oil to flow on his land. Except in the case of gushing wells, pumping is the only means by which the lessee or proprietor could possibly get, even the oil which is already under his land, to the surface.

This to us, apparently, self-evident right, came before the Pennsylvania Supreme Court in *Westmoreland Gas Co. v. DeWitt*, 130 Pa. 235, 249, 5 L. R. A. 731, 18 Atl. 724, which case was approved and followed in *Jones v. Forest Oil Co.*, 194 Pa. 379, 48 L. R. A. 748, 44 Atl. 1074.

But to the contrary is *Manufacturers Co. v. Indiana Co.*, 155 Ind. 461, 50 L. R. A. 768, 57 N. E. 912, 20 M. R. 672, sustaining a statute which forbade the owners of a gas well to reduce the pressure.

Exploding the Well.

This device, used constantly in certain fields, and which in an almost unaccountable manner so often increases the flow of oil, if there is any to flow, is only a subdivision of the previous head. It is an artificial means of increasing the flow of oil through the operator's well to the surface, whether it comes from his own land or from his neighbor's, and if he has the right to pump at all, it follows as a corollary that he has the right to explode his well, and this has not been successfully denied.—*Peoples Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433, 16 L. R. A. 443, 17 M. R. 481, 31 N. E. 59.

Wasting the Oil or Gas—Plugging Wells.

This subhead depends upon an entirely different principle. Where one proprietor seeks to obtain what some contend is his unequal share of the values, if it is a loss to others it is at least a gain to himself. But where he allows the product to go to waste it is a useless destruction of the common property, and laws forbidding it have been uniformly sustained.—*Ohio Oil Co. v. Indiana Co.,* 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729, 20 M. R. 466; *State v. Ohio Oil Co.,* 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

The lessor has a right of action against his lessee for allowing natural gas to go to waste.—*Talbott v. Southern O. Co.,* 60 W. Va. 423, 55 S. E. 1009; *Louisville G. Co. v. Kentucky H. Co.,* 132 Ky. 435, 111 S. W. 374.

An action will lie by a party interested in the common field for illegitimate waste of the gas.—*Calor O. & G. Co. v. Franzell,* 128 Ky. 715, 36 L. R. A. (N. S.) 456, 109 S. W. 328. And punitive damages may be awarded for malicious waste.—*Louisville G. Co. v. Kentucky H. Co.,* 132 Ky. 435, 111 S. W. 374.

Consideration of the rights of different sets of lessees to protection against waste of the common stock by each other, under the Kentucky statute.—*Louisville G. Co. v. Kentucky H. Co.,* 117 Ky. 71, 111 Am. St. Rep. 225, 4 Ann. Cas. 355, 70 L. R. A. 558, 77 S. W. 368.

A defendant will be enjoined from pumping mineral water and letting it run to waste to the injury of an adjoining land owner, who was using and bottling the water on his own ground.—*Gagnon v. French Lick Co.,* 163 Ind. 687, 68 L. R. A. 175, 72 N. E. 849.

A statute to compel the plugging of natural gas wells not in use, will be enforced.—*Commonwealth v. Trent,* 117 Ky. 34, 4 Ann. Cas. 209, 77 S. W. 390.

A gas well will not be enjoined where the defendant offers security and there is danger that the gas might be drained by other wells.—*Henry Gas Co. v. United States,* 191 F. 132, 111 C. C. A. 612.

Judicial notice will be taken that natural gas unlike oil can not be stored to await a market.—*Eastern Oil Co. v. Coulehan,* 65 W. Va. 531, 64 S. E. 836.

Oil and Gas Leases.

By far the greater part of the oil and gas produced is by the operation of leases.

In every lease there are two sorts of covenants—the express and the implied. The express covenants where clearly stated, interpret themselves. The implied covenants do not appear on the face of the paper, and are often not anticipated until some question arises and their sometimes serious consequences appear.

The respective rights and duties of both parties to an oil lease are fully and justly stated in the case of *Indiana Co. v. McCrory,* 42 Okl. 136, 140 P. 610.

The Express Covenants of a Lease of These Minerals Are usually: To sink; which may be limited as to the depth or to the amount to be expended or until some certain stratum is reached without pay, and in further detail it may give the size of the bore and kind of casing.

To pay rental: This is usually not large, but frequently is scattered over limited periods in the nature of payments for delay.

To pay royalty: How this is reserved depends upon whether there is a convenient pipe line or whether it is a mere prospecting adventure, and in general by the fact as to whether it is on ground reasonably certain to be productive or on ground which has made no promises to its explorers.

To so operate as not to prevent use of surface by the owner. Reserve the use of gas to the lessor if his dwelling is near the premises, and like use of oil or gas to the tenant for fuel at the well without royalty.

The other express covenants may vary indefinitely and the lease should not be drawn except by an attorney of experience in this line of drafting.

The Implied Covenants.

The covenants implied when not expressed are: To start to sink promptly, and to work with diligence, and the most subtle of such implied covenants is the doctrine of Protection.

Diligence.

What amounts to due diligence is a question of fact for the trial Court.—*Day v. Kansas City P. L.*, 87 Kan. 617, 125 P. 43.

Protection.

Protection is of two sorts:

First—To prevent the lessor from sinking on other land not covered by the lease so as to save the lessee from being drained in case he makes a profitable strike. This protection must be provided for in the lease, because it is not an implied covenant, as is the protection which the landlord claims.

Second—To protect the demised land where strangers have struck oil in the neighborhood and threaten to drain the demised ground. This sort of protection has been forced by judicial construction into the lease for the alleged safeguarding of the lessor and in instances it has been carried to extreme lengths.

Protection to Lessee.

In *Allison's Appeal*, 77 Pa. 221, 11 M. R. 142, lessee had been granted a protection of ten rods on the east, and eight rods on the north side. The lot demised was a parallelogram, and the Court held that the protection included the square in the northeast corner made by protracting the north and east lines of the conceded protection.

Protection to the Lessor.

In *Colgan v. Forest Oil Co.*, 194 Pa. 234, 75 Am. St. Rep. 695, 20 M. R. 338, 45 Atl. 119, lessor attempted to prove that lessee was not sufficiently protecting the property. He was bound by covenant to sink one well and had in fact put down

five. The Court held that he had the right to use his own judgment, and that it was only in cases where he was clearly favoring one lessor to the loss of another that he would be compelled to sink new wells, the justice of which ruling seems unquestionable.

Testator owning three farms gave an oil lease on all of them. On his decease the three farms came by devise to his three children severally; the only oil produced was on one of the three farms. The Court decreed that the royalties should be divided equally among the three children.—*Wettengel v. Gormley,* 160 Pa. 559, 47 Am. St. Rep. 733, 18 M. R. 93, 28 Atl. 934.

In *Kleppner v. Lemon,* the doctrine of protection was carried far. The lessee was only bound in terms to sink one well, which he had done, but there being wells on two sides of the demised tract, which were producing, the Court compelled the lessee to bind himself either to sink another well or forfeit the entire tract except the first well with a limited protection.—176 Pa. 502, 18 M. R. 404, 35 Atl. 109.—MITCHELL, J., dissented.

He elected not to sink the second well, and the litigation being carried on, he was decreed to pay full royalty on all of the oil taken from one of the adjoining tracts on which he held a lease, on the rule of damages in cases of confusion of goods (197 Pa. 430), which is the rule applied against wilful trespassers, and amounted to judicial confiscation. But on rehearing (198 Pa. 581, 48 Atl. 483, 21 M. R. 275) this was modified to one-eighth of such royalty. This one-eighth was reached by comparison of acreages.

In *Northwestern Ohio N. G. Co. v. Ullery,* 68 Ohio St. 259, 22 M. R. 647, 67 N. E. 494, and *Rymer v. S. Penn Oil Co.,* 54 W. Va. 530, 46 S. E. 559, the doctrine of *Wettengel v. Gormley* is expressly disapproved.

The lessee is under implied covenant to sink as many offset wells as due diligence and care would suggest to protect the leased land.—*Guffey Pet. Co. v. Jeff Chaison Townsite Co.,* 48 Tex. Civ. 555, 107 S. W. 60; *Highfield Co. v. Kirk,* 248 Pa. 19, 93 Atl. 815.

In *Harris v. Ohio Oil Co.*, the Supreme Court of Ohio recognized the rule of the implied covenant to protect lessor, but refused to forfeit the lease for failure to sink, holding that there can be no forfeiture for breach of an implied covenant.—57 Ohio St. 118, 48 N. E. 502, 19 M. R. 157; *Doddridge O. & G. Co. v. Smith*, 154 F. 970.

The only remedy the owner of land adjoining has against drainage of the oil under the property is to drill a well on his own land; but a lessee of two adjoining tracts can not drain the oil from one to the detriment of the other.—*Barnard v. Monongahela N. G. Co.*, 216 Pa. 362, 65 Atl. 801. And in *Culbertson v. Iola Co.* the lessee was held for drawing the gas by wells on other ground.—87 Kan. 529, Ann. Cas. 1914A, 610, 125 P. 81.

The lessee will not be allowed, arbitrarily, to choose locations for drilling wells in disregard of the rights of the land owner where equally good locations are available.—*Gillespie v. American Zinc Co.*, 247 Pa. 222, 93 Atl. 272.

Where a lessee had drilled one well and evinced no intention to protect his lessor by sinking other wells, he was decreed to have abandoned all interest in the lease, except the one well and sufficient curtilage to protect it.—*Highfield Co. v. Kirk*, 248 Pa. 19, 93 Atl. 815.

Form of Lease.

THIS INDENTURE, made this *first* day of *May*, in the year of our Lord one thousand nine hundred and sixteen, between *Ralph Benedict, of Denver, State of Colorado*, lessor, and *G. L. Warson, of the same place*, lessee or tenant: Witnesseth, that the said lessor, for and in consideration of the royalties hereinafter reserved and the covenants and agreements hereinafter expressed, and by the said lessee to be kept and performed, hath granted, demised and let and by these presents doth grant, demise and let unto the said lessee all the following described real estate situate in the County of *Fremont*, State of *Colorado*, to-wit: The northeast quarter of Section 1, Township 70 South, Range 19 West of the 6th P. M., containing 160 acres. Always saving, reserving and excepting to the lessor the surface and the use of the surface for agricultural and residence purposes.

TO HAVE AND TO HOLD unto the said lessee for the term of two years from date hereof and thereafter as long as oil or gas is found in paying quantities.

And in consideration of such demise the said lessee doth covenant and agree:

1. To sink at least one well on the demised ground to the distance of at least one thousand feet unless oil or gas is found within a shorter distance.

2. And to complete such sinking within six months from the date of this lease.

3. In default of the completion of the well to the depth aforesaid or until oil or gas is found as aforesaid this lease shall at the option of the lessor become null and void and the demised premises shall become forfeit to the lessor: *Provided always*, That the payment of $100 rent before the expiration of said six months shall allow another period of six months for such sinking.

4. To deliver as royalty to said lessor one-eighth part of all oil found in and saved from said land.

5. In case gas is found in quantities sufficient to pipe or market, the lessee shall pay to the lessor $50 per quarter from date when such gas is struck in the well, payable on the last day of each quarter.

6. If either oil or gas is found in paying quantities the lessee will forthwith, at his own expense, procure and place on the premises tanks, pipes and other necessary fixtures to economically save the product of such well and deliver its product to the buyer or carrier of the same.

7. In case oil is found in paying quantities the lessee will keep correct books of account showing the production of each well and the disposition of the proceeds thereof, which books shall be open to the inspection of the lessor or his agent during business hours at all reasonable times.

8. To deliver upon request to the lessor all the gas he may require for use at his buildings, or outbuildings on the premises, service pipes and fixtures to utilize the same being furnished by the lessor and kept in repair at his own expense.

9. To not sink any well within one hundred feet of any building now erected upon the premises, and to occupy with any well including its fixtures (except pipes) not more than one square acre.

10. To bury upon request of the lessor all oil or gas pipes used to conduct oil or gas from the premises, and to pay all damages done to timber and crops by reason of the burying, repairing, or removing of pipe lines over said premises except on the square acre allowed to each well.

11. The lessee may sink as many wells as he sees fit, paying the same royalty, and shall have the right to subdivide the ground into lots or tracts and to sub-lease the whole or any part of the demised premises;

and all fixtures are the property of the lessee or his sub-lessees with the right to remove during the term or within a reasonable time thereafter.

12. Delivery to any pipe line or responsible oil buyer of the lessor's proportion of the products of the well with instructions to pay to lessor his one-eighth of the gross price shall be full compliance with the above covenant to pay royalty.

13. The said lessee shall have the right to use free of charge, all oil and gas he may need as fuel, and shall have the right to dig a surface well for water for his engine.

14. In case oil or gas is struck on and marketed from any adjoining land within one hundred yards of the exterior boundary of the demised tract the lessee will sink a well or wells on the demised tract within fifty feet from the exterior line of such tract, upon written request and designation by the lessor of the point or points at which any such well is to be sunk, unless a well has been already started by the lessee within two hundred yards of such foreign well.

15. The lessor, upon his part, doth covenant and agree that he will not sink any well or lease any ground that he may own or purchase or control within two hundred yards of the exterior lines of the demised tract.

Each and every clause and covenant of this Indenture shall extend to the heirs, executors, administrators and lawful assigns of all parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals. RALPH BENEDICT, [SEAL.]
G. L. WARSON. [SEAL.]

The next form is one in common use in Oklahoma and Wyoming oil fields.

OIL AND GAS LEASE.

AGREEMENT, Made and entered into the *fifth* day of *September*, 1916, by and between.....of.....party of the first part, hereinafter called lessor (whether one or more) and *The Producers Oil Company*, party of the second part, lessee.

WITNESSETH, That the said lessor, for and in consideration of *eight hundred* dollars, cash in hand paid, receipt of which is hereby acknowledged and of the covenants and agreements hereinafter contained on the part of the lessee to be paid, kept and performed, has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and laying pipe lines, and building tanks, powers, stations and structures thereon to produce, save and take care of said products, all that certain tract of land situate in the County of

Okmulgee, State of Oklahoma, described as follows, to-wit: *The northeast quarter* of Section *33*, Township *14 North*, Range *14 East*, and containing *160* acres, more or less.

It is agreed that this lease shall remain in force for a term of *five* years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

First—To deliver to the credit of lessor, free of cost, in the pipe line to which he may connect his wells, the equal one-eighth part of all oil produced and saved from the leased premises.

Second—To pay the lessor *one hundred* dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making his own connections with the wells at his own risk and expense.

Third—To pay lessor for gas produced from any oil well and used off the premises at the rate of *twenty* dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance.

If no well be commenced on said land on or before the *fifth* day of *September*, 1917, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or to the lessor's credit in the *Exchange National* Bank at *Tulsa, Oklahoma*, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of *one hundred and sixty* dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for *twelve* months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like period of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privileges granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then, and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph

hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which his interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil, and water produced on said land for its operations thereon, except water from wells of lessor.

When requested by lessor, lessee shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the lessor.

Lessee shall pay for damages caused by its operations to growing crops on said land.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof; and it is hereby agreed in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental.

Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgages, taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof.

In witness whereof, the said parties have hereunto set their hands and seals.

THE PRODUCERS OIL COMPANY. [SEAL.]

By....., *President.* [SEAL.]

Brown v. Wilson, (Okla.) 163 P. 94, contains an exhaustive review of the varied forms of oil and gas leases.

For forms of oil and gas leases which have been adjudicated, see *Rose v. Lanyon Zinc Co.*, 68 Kan. 126, 74 P. 625, and *Pittsburg Co. v. Bailey*, 76 Kan. 42, 12 L. R. A. (N. S.) 745, 90 P. 803.

Rent—Royalty—Consideration.

The reports are replete with cases where attempts have been made to attack the consideration for the lease and to hold it void where the original consideration can be shown to be not more than nominal, but the general result of such cases is that if there is no covenant to sink or no time fixed for completing a well, the lease is not void for want of any binding covenant against the lessee, but the Court will read into the contract an implied covenant to sink and allow for such sinking a reasonable time, and that payments for delay, if accepted, are a good consideration, but the cases are not wholly consistent nor reconcilable on these points.

There is an implied covenant in every oil and gas lease for diligent sinking and working.—*Parish Fork Co. v. Bridgewater Co.*, 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566, 22 M. R. 145; *Aye v. Philadelphia Co.*, 193 Pa. 451, 74 Am. St. Rep. 696, 20 M. R. 177, 44 Atl. 555.

And the reservation of a small rental for delay will not prevent its cancellation where the lease continues indefinitely idle. —*Peoples Gas. Co. v. Dean*, 193 F. 938, 113 C. C. A. 566.

Where the space before the word "years" in the clause of an oil and gas lease limiting the time to complete the well was left blank, the lessee was entitled to a reasonable time.—*Erie Oil Co. v. Meeks*, 40 Ind. App. 156, 81 N. E. 518.

The Court will not allow it to be proved that the nominal consideration of one dollar receipted for was not paid, for the purpose of invalidating the lease.—*Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46.

Where there is no express limitation of the time to sink the well the law allows a reasonable time.—*New American Oil Co. v. Wolff*, 166 Ind. 704, 76 N. E. 255; *New American Oil Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739.

The consideration of one dollar with an acreage rental for delay is valid, and the contract is not void for want of mutuality.—*Pittsburg Co. v. Bailey,* 76 Kan. 42, 12 L. R. A. (N. S.) 745, 90 P. 803.

The reservation of rent as compensation for delay to sink makes a valid consideration.—*Indianapolis G. Co. v. Pierce,* 36 Ind. App. 573, 76 N. E. 173.

A written oil and gas lease is to be construed like any other written contract, and parol evidence will not be allowed adding new covenants to be followed by proof of breach of such alleged covenants and consequent forfeiture. And the Court will not import into a lease contrary to its express terms a covenant for immediate sinking.—*Rose v. Lanyon Zinc Co.,* 74 P. 625, 68 Kan. 126.

Peculiarities of oil and gas leases stated; a clause allowing the lessee to reconvey is not to be construed to allow the lessor to declare the lease void.—*New American Co. v. Troyer,* 166 Ind. 402, 76 N. E. 253, 77 N. E. 739.

A reserve in a lease of a right to cancel if it should be "detrimental to a sale of the place" means, if it should be detrimental to a sale of the premises as then used for surface purposes and was not intended to allow the lessor to cancel so as to get a better price for the oil values.—*Duntley v. Anderson,* 169 F. 391, 94 C. C. A. 647.

A lease for a nominal consideration, giving to lessee the right to sink within 60 days or the right to extend the time by payment of an annual rent, which he is not obligated to pay, may be canceled by lessor at any time after the 60 days, no well being bored, and the renewal rent not being paid.—*Dill v. Fraze,* 169 Ind. 53, 79 N. E. 971.

Lessee was to pay $50 per annum rent until gas was found and put to manufacturing purposes, in which event the rent was to be $100 for a term of ten years, "and as much longer as gas or oil is found in paying quantities," or the rental paid as herein provided for. Gas was found in quantity enough to

have been put to manufacturing purposes, but the lessee anchored the well, and paid only the smaller rent. *Held,* That he was not entitled to hold beyond the ten years.—*American Co. v. Williams,* 3 Ind. App. 685, 66 N. E. 912.

Where the demised tract later comes to belong to different owners, each owner is entitled to the royalties from wells on his own ground.—*Osborn v. Arkansas O. & G. Co.,* 103 Ark. 175, 146 S. W. 122.

The privilege to lessee to be allowed an extension of time to sink by paying rental is not a covenant to pay such rental, but only an option.—*United States v. Comet Oil Co.,* 187 F. 674.

The granting of exclusive right to bore for a given time for oil and gas, with an acreage rental, in case no well is drilled within six months, but with no covenant to sink or pay the rent, is a naked option revocable at will of the lessor.—*O'Neill v. Risinger,* 77 Kan. 63, 93 P. 340.

There is an implied covenant for good title in an oil and gas lease not only of the grant of the right to search, but of the ownership of the product when found.—*Kilcoyne v. Southern O. Co.,* 61 W. Va. 538, 56 S. E. 888; *Headley v. Hoopengarner,* 60 W. Va. 626, 55 S. E. 744.

An oil lessee holding by condition that he put down a well or pay so much per month, but without covenanting to do either, may insist on forfeiting his rights.—*Glasgow v. Chartiers Co.,* 152 Pa. 48, 25 Atl. 232, 17 M. R. 523. Nor does such right to pay for extended time make him personally liable for the money.—*Hays v. Forest Oil Co.,* 213 Pa. 556, 62 Atl. 1072.

Consideration of extent of right to use surface where the lease is of the oil and gas rights only.—*Fowler v. Delaplain,* 79 Ohio St. 279, 21 L. R. A. (N. S.) 100, 87 N. E. 260; *Barnsdoll Co. v. Leahy,* 195 F. 731, 115 C. C. A. 521.

Forfeiture.

Equity will not forfeit an oil lease for failure, chargeable to the lessor's bad faith.—*Doddridge Co. v. Smith,* 154 F. 970.

Where there was no pipe line or other market for the gas the Court will not forfeit a lease for breach of covenant to sink, but leave the lessor to his action for damages.—*Poe v. Ulrey,* 233 Ill. 56, 84 N. E. 46.

A lessor can not accept the rent and afterwards enforce a supposed right to forfeit for non-development.—*Monarch O. Co. v. Richardson,* 124 Ky. 602, 99 S. W. 668; *Dill v. Fraze,* 169 Ind. 53, 79 N. E. 971; *New American O. Co. v. Wolff,* 166 Ind. 704, 76 N. E. 255; *New American Co. v. Troyer,* 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *Smith v. Steele,* 96 Kan. 106, 150 P. 519.

Where the lessee has been boring with diligence the Court may extend the time to prevent a forfeiture.—*Eastern Co. v. Coulehan,* 65 W. Va. 531, 64 S. E. 836. This is a well considered case as to when an estate in the leased oil vests and how it may be lost, and of the right of protection to a lessee against harsh covenants.

Where the lessor allows the tenant to continue at work on the well under difficulties after notice to quit, he is estopped to enforce a forfeiture under the notice.—*Campbell v. Rock Oil Co.,* 151 F. 191, 80 C. C. A. 467.

The activity of oil operations in the locality will be considered on the question of diligent development.—*Buffalo O. & G. Co. v. Jones,* 75 Kan. 18, 88 P. 537.

After lapse of a reasonable time to sink, lessor is entitled to a cancellation of the lease.—*Kimball O. Co. v. Keeton,* 31 Ky. L. 146, 101 S. W. 887; *Davis v. Riddle,* 25 Colo. App. 162, 136 P. 551.

Long delay to pump after striking oil held ground for cancellation, although it was not shown that the wells could have been worked to a profit, but the lessees were allowed to remove the casings.—*Collins v. Mt. Pleasant Co.,* 85 Kan. 483, 38 L. R. A. (N. S.) 134, 118 P. 54.

Damages for Failure to Sink.

Bradford Oil Co. v. Blair is one of the earliest cases where damages were given for breach of covenant to operate an oil well with diligence, the particular language there used being "without interruption for the common benefit of the parties," and the measure of damages was ruled to be the value of the oil royalty, which diligence would have produced in excess of what was produced less cost of production, adding interest.—113 Pa. 83, 57 Am. Rep. 442, 4 Atl. 218.

A "forfeit" of $500 for failure to sink three wells will be construed as liquidated damages, and not as a penalty.—*Davidson v. Hughes,* 76 Kan. 247, 91 P. 913.

The question of damages for failure to sink under two contracts more or less connected was considered in *Gayton v. Day,* 178 F. 249, 101 C. C. A. 609.

Oil in Paying Quantities.

It is for the operator, the lessee, to say whether oil is being obtained in paying quantities.—*Lowther O. Co. v. Miller-Sibley Oil Co.,* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 M. R. 656.

It is paying where receipts exceed expenses, although it may never repay the original cost.—*Id.*

In a gas lease giving a rental in case gas is produced in sufficient quantities to make it profitable, the cost of sinking the well is not to be considered, but only the operating expense. —*Indiana N. G. Co. v. Wilhelm,* 44 Ind. App. 100, 86 N. E. 86.

Construction of Terms of Lease.

From the many incidents peculiar to oil and gas, the rule of construction of oil and gas leases is more strict in favor of the lessor than in other mining leases.—*Frank Co. v. Belleview Co.,* 29 Okla. 719, 43 L. R. A. (N. S.) 487, 119 P. 260.

Where a lease is ambiguous on its face the Court will adopt that construction which the parties themselves have put upon

it.—*Pittsburg Co. v. Bailey,* 76 Kan. 42, 12 L. R. A. (N. S.) 745, 90 P. 803.

Natural gas lease construed to cease by its terms when natural gas ceased to be used generally for manufacturing purposes.—*Diamond Co. v. Knote,* 38 Ind. App. 20, 77 N. E. 954.

The Court may take judicial notice that the pressure of gas in a well will decline, but where parties have accepted a test pressure, the same condition of things will be assumed to continue until proof of different conditions.—*Moore v. Ohio Val. Gas Co.,* 63 W. Va. 455, 60 S. E. 401.

In *Burton v. Forest Oil Co.* the Court refused to allow proof of a trade distinction between gas from a gas well (proper) and gas from an oil well.—204 Pa. 349, 22 M. R. 507, 54 Atl. 266.

The casing of an oil well is a fixture removable by the lessee. —*Perry v. Acme Oil Co.,* 44 Ind. App. 207, 80 N. E. 174, 88 N. E. 859; *Churchill v. More,* 4 Cal. App. 219, 88 P. 290.

The assignment of a lease does not carry the pumped oil on hand.—*Dresser v. Transportation Co.,* 8 W. Va. 553; *McGuire v. Wright,* 18 W. Va. 507.

Oil Sinking Contracts.

Measure of damages where defendant agreed to sink oil well 2,000 feet, and quit at 1,500 feet.—*Corbin Co. v. Mull,* 123 Ky. 763, 97 S. W. 385.

Judgment sustained on contract to pay $1,500 as liquidated damages for failure to sink oil well by lessee.—*Blodget v. Columbia Co.,* 164 F. 305, 90 C. C. A. 237.

Plaintiff contracted to drill six gas wells at 80 cents per foot. After drilling three the owner ordered the work stopped. *Held,* That plaintiff could recover for the profits he might reasonably have expected to make by showing the cost of sinking in similar *strata,* the oil field being well developed and essential facts being readily provable.—*Fredonia Gas Co. v. Bailey,* 77 Kan. 296, 94 P. 258.

A covenant to provide proper tubing and casing is no guaranty that such appliances will keep the water out of the well.—*Vail v. Freeman,* 144 Cal. 356, 77 P. 974.

Damages in Oil Trespass Cases.

The measure of damages for wrongful taking of oil is the same in principle as that in ore trespass cases (p. 446), depending on the degree of wrong of which the trespasser is guilty. In some instances the value of the coal or ore in place is made the true measure, but that can not be applied in an oil or gas case. It seems that the measure is confined (1) to the value of the product when severed or (2) to the value of such product less the cost of production or (3) to customary royalty.

Trespassers who drilled for oil, believing they had a lawful right, are liable only for royalty as the measure of damages.—*Turner v. Seep,* 167 F. 647.

A pipe line company wrongfully took the gas from the well belonging to plaintiff, so that it became one of 60 wells feeding the pipe line. Defendant was decreed to pay for one-sixtieth part of the total supply as the fairest approximation to the proper measure of damages.—*Great Southern Gas Co. v. Logan Gas Co.,* 155 F. 114, 83 C. C. A. 574.

Holders of a junior oil lease allowed deductions for expenses prior to their knowledge of the older lease: after notice, required to account in full.—*Guffey v. Smith,* 237 U. S. 101, 35 Sup. Ct. Rep. 526, 59 L. Ed. 856.

Miscellaneous Rulings.

A State can not forbid the exportation of natural gas. Such substance is the property of the individual who lawfully reduces it to possession.—*Kansas N. G. Co. v. Haskell,* 172 F. 545.

A gas company can not charge rent for its meter. The customer can not be compelled to pay for the measurement of the gas he uses.—*Louisville G. Co. v. Dulaney,* 100 Ky. 405, 36 L. R. A. 125, 38 S. W. 703.

The natural gas supply began to fail and the fuel was supplied at greatly increased cost to the gas company. All its other subscribers consented to increased rates. *Held,* No case for equity to compel delivery by preliminary injunction.—*Brown v. Equitable G. Co.,* 155 Pa. 359, 26 Atl. 433.

A manufacturing company contracting for natural gas for fuel only but using it for illuminating purposes also, is liable upon a *quantum valebat* for such extra use.—*Philadelphia Co. v. Park,* 138 Pa. 346, 22 Atl. 86.

Construction of contract for daily delivery of oil by the month, holding that excess delivery one month does not count to excuse non-delivery another month, and that breach by one party does not render the contract "void," but excuses performance by the other.—*Central Oil Co. v. Southern Ref. Co.,* 154 Cal. 165, 97 P. 177.

The Court will take judicial notice that gas, unlike oil, can not be stored.—*Eastern Co. v. Coulehan,* 65 W. Va. 531, 64 S. E. 836.

An oil lease is a chattel real, and personal property.—*Duff v. Keaton,* 33 Okla. 92, 42 L. R. A. (N. S.) 472, 124 P. 291.

OIL CLAIMS ON THE PUBLIC DOMAIN.

Oil Lands.

Ever since the passage of the placer mining act, lands valuable for deposits of petroleum were considered as open to location and patent as placer claims, and as such, records were made followed by entries and patents as a matter of ordinary course.—4 L. D. 60, 284, 16 *Id.* 117. And such action of the land office was followed by the Courts in dealing with oil located or patented as placer ground without question of its regularity.—*Gird v. California Oil Co.,* 60 F. 532, 18 M. R. 45; *Van Horn v. State,* 5 Wyo. 501, 40 P. 964.

After this unbroken procedure of more than 20 years, the land office in 1896 *(Union Oil Co.,* 23 L. D. 222) abruptly held that oil was not a mineral and oil lands therefore not subject to entry. This was immediately followed by an Act of Congress making such lands in terms patentable as placers.—29 St. L. 526. The ruling itself which induced the confusion was later reversed by the Secretary of the Interior.—25 L. D. 351.

The A. C., above referred to, allowing their entry, is printed on p. 648, and the special A. C. for annual labor on oil claims on p. 142. They are located and held like any other class of placers.—*De Wolfskill v. Smith,* 5 Cal. App. 175, 89 P. 1001.

Discovery.

The only obvious distinction is, that from the nature of things there can be no such thing as an open surface discovery. The New Mexico Statute recognized this fact by making special provision, allowing time to sink the well (p. 276), and the Courts liberally protect the operator while sinking. As to this class of claims it has been held that oil seepage or surface indications or knowledge of its existence upon adjoining lands is not enough to count as a discovery.—*Nevada Oil Co. v. Miller,* 97 F. 681, 688; *Nevada Co. v. Home Co.,* 98 F. 673, 20 M. R. 283; *Olive Co. v. Olmstead,* 103 F. 568, 20 M. R. 700; *Weed v. Snook,* 144 Cal. 439, 77 P. 1023.

The locators of an oil placer are entitled to hold possession and to be protected against invasion while sinking, although they have not yet a discovery. A neighbor, although he has a prior actual discovery by striking oil, will not be allowed to survey in such claim.—*Phillips v. Brill,* 17 Wyo. 26, 95 P. 856; but a party will not be so protected, when he merely stakes and guards the claim—*Whiting v. Straup,* 95 P. 849, 17 Wyo. 1, 129 Am. St. Rep. 1093; *New England Co. v. Congdon,* 152 Cal. 211, 92 P. 180; *Smith v. Union Co.,* 166 Cal. 217, 135 P. 966. An idle derrick will not defeat a homestead entry.—*McLemore v. Express Co.,* 158 Cal. 559, 139 Am. St. Rep. 147, 112 P. 59.

An oil well was sunk on the boundary line between two claims in which well oil was discovered. *Held,* That it was good to hold one of the claims at least, whichever the party chose to apply it to.—*Phillips v. Brill,* 17 Wyo. 26, 95 P. 856.

A party located a placer oil claim on which he had no discovery and sold a part of it to plaintiffs. He then was employed by defendants to locate placer oil claims for them. He located the same land which he had sold to plaintiffs. *Held,* That defendants were not estopped by their agent's deed to claim the benefits of his discovery and location.—*Whiting v. Straup,* 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 P. 850.

Boring into "shale grease" is not a discovery of oil.—*Dean v. Omaha Co.,* 21 Wyo. 133, 128 P. 881, 129 P. 1023. Oil seepage and slight flow of gas no discovery.—40 L. D. 602. The same as to oil shale.—39 L. D. 335.

An oil placer claim was staked and recorded and a derrick erected, but the boring was not prosecuted with any diligence and no oil had been discovered. At this juncture a party entered upon the land to homestead it, and the Court held that he had the better right.—*McLemore v. Express Oil Co.,* 158 Cal. 559, 139 Am. St. Rep. 147, 112 P. 59.

Failure to follow up a strike of oil by pumping does not invalidate the discovery.—*Borgwardt v. McKittrick Co.,* 164 Cal. 650, 130 P. 417.

The decision in lode and placer cases that the discovery must be within the lines of the claim, that the order of the several items of location is immaterial when once fully complete (no third parties intervening), and the right to file amended records and notices, apply to oil claims.—*Dean v. Omaha Co.,* 21 Wyo. 133, 128 P. 881, 129 P. 1023.

In *Hullinger v. Big Sespe Oil Co.* the Court said that title by location and possession without discovery was good against every person except the United States.—28 Cal. App. 69, 151 P. 369. But in this case both parties were in privity with the same title, and rights of a second locator were not in contest.

The Five Claims Act.

The "annual assessment labor" mentioned in the section printed on page 142, means the annual labor and not location work, and a discovery on one of a group of oil claims is not good to hold another claim in the group.—*Smith v. Union Co.*, 166 Cal. 217, 135 P. 966.

Withdrawal of Oil Lands.

Oil lands can not be withdrawn from entry after rights vested by discovery.—*United States v. McCutchen*, 217 F. 650.

But see this case as later reported, under THE WITHDRAWAL ACTS, p. 422.

Relocator Out of Possession.

Both plaintiff and defendant had locations imperfect for want of staking and insufficient record. Plaintiff's title began in 1899, defendant's in 1900. Defendant kept possession and did his annual labor, which plaintiff did not. Plaintiff filed a relocation after adverse suit begun, and was allowed to bring it into the record. *Held*, That defendant's possession was good against the attempted relocation by a party out of possession, and in default on his annual labor.—*Ware v. White*, 81 Ark. 220, 108 S. W. 831.

MEXICAN MINING LAW.*

Not only the mining laws of the Republic of Mexico, but also those of the United States, are very largely the outgrowth of the civil rather than the common law, notwithstanding the fact that the law of the United States has, in most instances, been an offspring of the common law of England.

*For the text of this Chapter we are under obligations to Messrs. Richardson & Doan, Douglas, Ariz., authors of "Digest of the Mexican Mining Law," and "The Corporation Laws of Mexico."

The civil law concerning mines, which was in force in Spain at the time of the settlement of Mexico by the Spaniards, was based upon the assumption that mines should not become property in the same sense as the soil, but should be held and worked for the public good. This law regarded gold, silver and precious stones as belonging to the state, absolutely, while some of the baser metals belonged to the owner of the soil, subject to control by certain of the departments of state. The resemblance to the common law of England exists in the case of "royal mines" which, when proved to exist within private ground, are still considered the property of the crown.

The present mining law of Mexico is of recent enactment. The old Spanish mining laws in force at the time Mexico secured her independence (1822) were retained for many years, with such changes only as were necessitated by the change in the form of government; and until the adoption of the recent laws, the Spanish ordinance of May 23, 1783, was largely determinative of all rights in mining properties.

Under the present law the title to all mines, with the exceptions hereinafter noted, is in the Republic of Mexico, and when it passes title it is in the form of a lease, perpetual so long as the federal tax is paid. This tax is substituted for the old royalty, which was a part of the metal extracted. There is no work now required of the possessor of mining rights, his title depending upon the payment of the tax imposed.

Although the theory of ownership is quite different from that in the United States, the manner of disposing of mineral rights in Mexico is quite similar to that of our own country.

The Minister de Fomento is a cabinet officer whose duties relative to the disposition of the Mexican public domain are almost identical with those of the Secretary of the Interior. The Mineral Agents, who are appointed for the respective districts throughout the Republic, perform the duties which, in the United States, devolve upon the Register and Receiver of the local land offices, while in addition they attend to the recording of locations or "denouncements" of claims and the

survey for patenting; in this respect taking the place of the County Recorder and Surveyor General.

The term "claim," as used in the mining laws of the United States, has no exact equivalent in the Mexican law; the word *pertenencia* (meaning portion) is the unit of measurement of the surface of mining rights as in the old Spanish law.

A *pertenencia*, under the present law, consists of a piece of ground the surface of which is 100 metres square (about 328 feet), and in size can be departed from only in case former locations have segregated the ground in such shape that the form and size must, of necessity, be varied.

Under the present law any proper person may locate a piece of mineral ground containing as many *pertenencias* as he desires, although he may not locate less than one *pertenencia*, except in those cases where former locations have left an isolated piece of ground, the area of which is less than a *pertenencia*.

Originally the manner of initiating a right to mineral ground bore considerable resemblance to the procedure of miners under the local district rules in the United States during the great mining activity following the discovery of gold in California; while the present law still contains many features in common with our law.

The person locating or "denouncing" a piece of mineral ground must be a citizen of Mexico, or a domestic corporation if the ground is within the prohibited zone of eighty kilometers along the border of an adjoining country, but both foreigners and foreign companies can freely locate and acquire title to mines not falling within this zone.

The many controversies arising in the United States over the mineral or non-mineral character of the ground are agreeably absent in Mexico. The Department de Fomento seeks to encourage and assist the legitimate miner attempting to develop property, having a fair prospective value as mining ground. The suspension of patent proceedings at the instigation of disinterested parties seldom occurs.

Under the Mexican law there is absolutely no extralateral right of any character. The one owning a mining "title" can work all mineral within his property, but can not extend his working beyond his side or end lines in any event. Moreover, the mining title does not carry any surface right as understood in the United States. If the mine is located within land belonging to some other person the surface rights must be acquired by purchase or condemnation, while if on government ground, the right to the surface only exists, in so far as it is necessary for the working of the mine and may not cover the entire surface of the claim.

What changes have been made in Mexico in mining law since the above was written in 1910 can not be stated in print until a stable form of government for that country is worked out, nor until the United States return to its ancient policy of protecting its citizens and their property rights in foreign countries.

The 640 Acre Homestead Law

was approved December 29, 1916, after the body of this book was in press. Its section 9 contains a reservation of all minerals to the United States leaving the land, even after patent issues, open to prospecting and entry as mineral land either for its coal or its lode values, and even doubtless, to a certain extent, as a placer claim, under regulations to be issued by the Interior Department, which should appear in Vol. 45 or 46 of the Land Decisions.

GLOSSARY OF MINING TERMS

ABANDONMENT. Quitting a claim with no intention to further assert title. The relinquishment of a right.

ACEQUIA. A ditch. *Spanish.*

ADIT. A horizontal drift or other passage used as an opening or drain to a mine; applied to no level except one opening on the surface. *Latin.*

ADVENTURER. A shareholder.

ALLOY. A compound of two or more metals fused together.

ALLUVIUM. The sediment of streams and floods. *Latin.*

AMALGAM. The mechanical combination of quicksilver with gold or silver.

ANDESITE. A dark porphyritic lava, composed of black crystals imbedded in a mass of light colored feldspar. ANDESITE BRECCIA. Fragmental andesite united into a compact rock by silica and other natural cementing materials. The main eruptive rock of the Cripple Creek district. ANDESITE TUFF. Andesite in minute fragments, finer than breccia. *John Wellington Finch.*

ANTICLINE. The bend of a stratum with the convex side up. Opposed to synclinal.

ANTIMONY. A silver white, hard, crystalline, metallic element, found in non-commercial quantities in many ores. Used in alloys and in medicine.

APEX. The top of a lode. *Latin.*

ARASTRA. A circular mill for grinding quartz by trituration between stones attached loosely to cross arms. *Spanish.*

ARCH. A part of the gangue left standing for support.

ARGENTIFEROUS. Silver bearing. *Latin.*

ARSENIC. A volatile metallic element, notoriously poisonous in its fumes or in any other form. Used as a drug in a form of arsenious oxide or white arsenic. It forms many oxides and sulphides. Extensive deposits in Canada.

ASBESTOS. A mineral product of a silky texture when pure. Inert, non-combustible, non-conductor of heat and electricity. Fire-proof material par excellence. Occurs in two varieties, the fibrous and non-fibrous. The former only has much commercial value. *Victor Blanc, Assayer.*

ASCENSION THEORY. That referring the filling of fissures to matter from below. *Von Cotta,* 71.

ASPHALT. A solid form of native bitumen, which occurs more or less pure, or mixed with inorganic or other adventitious non-bituminous matter. The name is also applied, commercially and in engineering parlance, to materials in general containing this form of native bitumen or any form resembling it. See BITUMEN. *C. O. Baxter.*

ASSAY. A test of the mineral contained in a larger mass by extracting and weighing the product of a sample. See p. 482.

ASSESSMENT WORK. The annual labor ($100) required to hold a claim. See p. 114.

AURIFEROUS. Gold bearing. *Latin.*

BACK. The roof of a drift stope or other working.

BAL. A mine. *Cornish.*

BANK. The surface at the pit's mouth.

BANKET. Term applied to the ore of the Rand Reefs.

BANKSMAN. The man at the shaft-mouth who handles the bucket. *Cornish.*

BAR DIGGINGS. Gold washing on river bars.

BARRIERS. Masses of unworked gangue or coal left to prevent drainage from mine to mine.

BASALT. A lava rock having a tendency to form jointed columns. It may hold iron enough to deflect the needle, but is not known to carry constituents of value.

BASE BULLION. Pig lead containing its gold and silver unseparated.

BASE METALS. All metals except gold, silver, mercury and the platinum group, which are termed noble metals.

BAUXITE. An earthy or clay ore, red to white in color. A ferric hydroxide. The principal source of aluminum.

BED. A horizontal seam or deposit of ore.

BED ROCK. The solid rock outcropping at surface or underlying the gravel, slide or other loose earth.

BISMUTH. A brittle crystalline grayish white metal very easily fusible. Found as an oxide or sulphide in ores of gold, silver, copper and other metals. Not usually distinguishable except by assay. As distributed with such ores, has no commercial value unless of high percentage. *Frank M. Taylor.*

BITUMEN consists of a mixture of native hydrocarbons and their derivatives, which may be gaseous, liquid, a viscous liquid or a solid, but, if a solid, melting more or less readily on the application of heat, and soluble in turpentine, chloroform, bisulphide of carbon, similar solvents and in the malthas or heavy asphaltic oils. Natural gas, petroleum, maltha, asphalt, grahamite, gilsonite, ozokerite, etc., are bitumens. See ASPHALT. *C. O. Baxter.*

BLACK JACK. A dark variety of zinc blende.

BLENDE. A sulphide of zinc.

BLOSSOM. Decomposed out-crop of a vein. Gossan. Iron hat.

BLOW-OUT. A spreading out-crop.

BONANZA. Fair weather at sea; a large body of paying ore. Became a familiar term upon the opening of the immense ore bodies in the Comstock. *Sp.*

BOOM DITCH. The ditch from the dam used in booming. (2) A slight

channel cut down a declivity into which is let a sudden head of water intended to cut to bed-rock and prospect for the apex of any underlying lode.

Booming. A kind of placer mining where the water is accumulated in a dam and let out at intervals, so as to utilize its cutting power in the form of a torrent.

Borrasca. The reverse of Bonanza. Out of pay.

Boulder. A large, loose, rounded stone.

Brattice. A bulkhead.

Breast. The heading of a drift, tunnel, or other horizontal working.

Breccia. A conglomerate of angular fragments.

Brittle Silver. Stephanite. A sulphide of antimony and silver containing 68.5 per cent silver with the antimony variable. Sometimes contains iron, copper and arsenic; variable in color, hardness and specific gravity. *B. B. Lawrence.*

Broaching. Trimming or straightening a working.

Bronze. An alloy of copper and tin. Brass is an alloy of copper and zinc.

Puddling. Separating ores by washing.

Bullion. Uncoined gold or silver.

Cache. A place where a prospector's provisions or outfit are buried or hidden. *French.*

Calamine. An ore of zinc. *Lapis Calaminaris.*

Calaverite. A telluride of gold, containing 55.5 per cent tellurium and 44.5 per cent gold; allied to and commonly misdescribed as sylvanite; sometimes distinguishable from the latter by a yellow color and lack of crystallization. *J. W. Finch.*

Canon. A narrow valley. Termed Box Canon when the sides are perpendicular. *Spanish.*

Cap. Space where the walls contract so as to leave only a trace of the vein. A pinch. (2) A space in the vein where the gangue becomes barren.

Carbonates. The combination of carbonic acid with bases. Soft carbonates have lead for a base. Hard carbonates have iron for a base. An ore of lead and silver.

Carnotite. An ore carrying vanadium and uranium in the form of a vanadate of uranium and potassium; generally occurs as an impregnation in sedimentary sandstone beds. Largest known deposits, in San Miguel and Montrose counties, Colorado. *A. B. Frenzel.*

Cement. Gold-bearing gravel united and hardened into a compact mass.

Cerusite. A valuable lead carbonate ore, easily convertible into white lead. Noted for its cabinet specimens of crystals. Supposed to be galena with its sulphur displaced.

CHALCOPYRITE. ($CuFeS_2$) Cu-34.6 per cent. S-34.9 per cent. Fe-30.5 per cent. The most abundant ore of copper and considered by some authorities to be the original from which all other copper bearing ores have been derived by processes of alteration. *Cranston Howe Carpenter.*

CHIMNEY. A pocket or ore body when found pipe shape, with general perpendicular position.

CHLORIDES. Compounds of chlorine with other elements.

CHUTE (or SHOOT). A flume for sliding ore. (2) A chimney of ore. *French.*

CINNABAR. Sulphide of mercury.

CLAIM. A location. The amount of ground which may be located by a single person or association. See p. 591.

CLEAN-UP. The operation of collecting the gold which has settled in the flume of a placer or in an arastra.

CLEAVAGE. The property of splitting more or less readily in certain definite directions.

COASTER. One who picks dump, or gleans in abandoned mines for ore in sight.

COBALT. A hard, gray ductile metal. Its ores are usually combined with nickel, arsenic or sulphur. Used in pottery glazing and glass staining. See NICKEL.

COBBING. Ore sorting.

COLLAR. The top of a shaft or winze. (2) The timbering of a shaft when carried above the surrounding surface.

COLOR. A particle of gold in the pan.

CONCENTRATION. The removal by mechanical means of ore from the gangue or slime.

CONTACT. The plane of meeting of two formations.

CONTACT VEIN. A vein along the plane of contact of two dissimilar formations, consequently separating the two formations. *Von Cotta,* 28.

COPPER. A metallic element. Red, hard, sonorous, ductile, malleable, non-magnetic, notable as best available conductor of electric current. Name derived from island of Cyprus.

COST-BOOK COMPANY. A system of mining partnership local to Cornwall and Devon.

COUNTRY ROCK. The rock beyond the walls of a lode. The strata between or across which the lode is found.

COURSE OF VEIN. Its strike. The horizontal line on which it cuts the country rock.

COYOTING. Spasmodic, irregular, surface mining.

CRADLE. A rocker. A short trough for washing gold.

CRIBBING. The timber lining of a drift, shaft, winze or mill-hole. The term also is applied to rough or light timbering as distinguished from solid set work.

CROSS COURSE. An intersecting vein.

CROSS CUT. A level driven across the course of a vein. A short tunnel.

CUBIC EQUIVALENTS. The following table gives the equivalent in cubic feet of a ton of the ordinary ores and their gangues to be used to calculate ore in sight, displacements, etc.:

	Cubic Feet.
One ton of water (the unit) equals	32.03
Galena	4.39
Iron Pyrite	6.68
Copper Pyrites (yellow)	7.67
Lead Carbonate (cerusite)	4.96
Zinc Blende	8.02
Silicious Gangue	11 to 16
Silica (White Quartz)	11 to 13
Granite or Gneiss, about	12

The above figures are for rock and ore in place. When broken they occupy about one-fourth greater space. When the specific gravity is known divide 32.03 by the figure denoting the specific gravity, and the result is the cubic contents of a ton of the material. The specific gravity of sulphur is 2.05. (32.03÷2.05=15.62 cubic feet.) *Arthur Howe Carpenter.*

CUT. To intersect a vein.

CYANIDE. A compound of cyanogen with a metal. The Cyanide Process of gold extraction is performed by passing an auriferous solution of potassium cyanide over zinc shavings, by which the values are precipitated. *Henry Lewis on Gold Mining. Thomas R. Beaumont.*

DEAD WORK. The developing of a mine preparatory to stoping. See p. 358.

DEBRIS. The loose fragments detached from the bed rock and washed down, to which the term slide is more appropriate; waste rock of any kind. *French.*

DEEP. The lower portion of a vein.

DENOUNCEMENT. The Mexican or Spanish equivalent to "location and record" of a claim.

DESCENSION THEORY. The theory that veins were filled from above.

DIGGINGS. Placers. *Amer.*

DIKE. A fissure made and filled by plutonic action. Its rock is most commonly porphyry. It is often barren, but in some cases mineralized; or may carry a mineralized selvage and so appear as the wall of a lode.

DILUVIUM. A deposit of loose boulders, earth, etc., attributed geologically to deposition from water.

DIP. The line of declination of strata. *Bainbridge. Yale.*—The angle which a lode makes with the plane of the horizon. *Von Cotta*, 26. The departure of a vein from the perpendicular or from the horizontal.

DITCH. An artificial water course, flume or canal.

DIVINING ROD. A stick of witch hazel or other like device used in prospecting for lodes. *Law v. Grant*, 7 M. R. 57, 37 Wis. 548.

* DOLLAR. From the German *Thaler*. One hundred cents. GOLD 23.22 grains; alloy 2.58 grains; weight 25.8 grains. Coined 1849-1889. SILVER 371¼ grains; alloy 41¼ grains; weight 412½ grains. Coined 1794-1803, 1836-1838, 1840-1873, 1878-1904. Legal tender unlimited. The Mexican dollar contains 377.17 grains silver and 40.62 grains alloy. Spanish dollar the same. *D. F. Harris, Numismatist, Adams, N. Y.*

DOWNCAST. A ventilating shaft with descending current of air.

DRIFT. An underground passage driven horizontally on or with the vein.

DUMMY ASSAY. A dummy or blank assay is the search for any interfering element such as impurities contained in the chemicals used in making the determination that might alter the true returns of an ore. It may also be defined as the addition, to the regular work, of a chemical determination of a known quantity of the pure element sought for, to ascertain if the method used is applicable to the mineral on hand in case of doubt. *Victor Blanc, Analytical Chemist, Denver.*

DUMP. A deposit, or place of deposit, of waste rock or tailings.

ELVAN COURSE. A plutonic dike. *Lyell. Argall. Corn.*

EXPLOITATION. The active working of a mine as distinguished from prospecting.

FACE. Synonymous with breast.

FATHOM. A space 6 feet forward and 6 feet vertical with the width of the vein.

FAULT. A dislocation of strata. *Bainbridge. Yale.* The dislocation of a vein from its original position; a heave; a throw. *Von Cotta*, 29.

FEEDER. A small vein starting from some distant point and running into a main lode. It is practically synonymous with spur. See *Bainbridge*, 2.

FELDSPAR. A vitreous crystalline constituent of granite, gneiss, porphyry and many other rocks.

FISSURE VEIN. A fissure or crack in the earth across its strata, filled with mineralized matter.

FLOAT *or* FLOE. Loose quartz or ore detached from the vein and found below it.

FLOOR. The rock underlying a horizontal vein or deposit.

FLUME. A ditch carried in frame work on or above the surface.

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* The die for the dollar of 1804 was made but not used in that year. Many years later twenty pieces were surreptitiously struck by an employee in the mint. Of these, twelve were sold as cabinet specimens and the other eight were surrendered to the superintendent of the mint on discovery of the fact. One of these was placed in the U. S. coin collection at Philadelphia, and the other seven destroyed.

FOOT WALL. The under wall of the vein.

FORFEITURE. The loss of possessory title as the result of abandonment or failure to comply with the conditions under which the title was held.

GAD. A small pointed wedge.

GALENA. A sulphide of lead; when not amorphous is crystallized on the cubic system; when pure contains 86.6 per cent lead, 13.4 per cent sulphur. Carries silver in greatly varying quantities.

GALLERY. A level or drift; applied chiefly to collieries.

GANGUE. Crevice material; vein matter; the base material forming the matrix of the ore.

GASH VEIN. A vein which continues for practical purposes only a short distance below the sod, generally narrowing as it descends.

GEODE. A rounded nodule of stone containing a cavity studded with crystals or mineral matter; the cavity in such nodule.

GLORY HOLE A large funnel-shaped excavation from the surface used as a method for extraction of ore without going under cover. *Fred H. Nye, Denver.*

GNEISS. A rock composed of the same constituents as granite, but foliated or stratified.

GOB FIRE. Fire in collieries produced by spontaneous combustion.

GOLD. A metallic element; bright yellow. Almost invariably found native associated with a variable percentage of silver. One ounce pure gold coined in U. S. dollars is worth $20.67.

GOSSAN. See IRON HAT.

GOUGE. A soft selvage; a clay streak found following a wall, or a slip or an ore measure.

GRANITE. A plutonic crystalline rock composed of feldspar, quartz and mica.

GRASS. The surface over a mine. *Corn.*

GRASS ROOTS. A term used where a working is started from, or worked up to, the surface.

GRAY COPPER. Tetrahedrite. An ore containing copper 15 to 42 per cent, combined with iron, zinc, silver, mercury, arsenic and antimony. It varies in color, hardness and specific gravity.

GRIZZLY. A grating to catch and throw out the larger boulders from the sluice.

GRUB STAKE. Provisioning a prospector on a bargain to share his discoveries.

HADE. The dip of the vein or the incline of a fault. *Corn.*

HANGING WALL. The upper wall of a vein.

HEADING. The breast or face of a working.

HEADINGS. The mass of gravel and pay dirt above the head of a sluice.

HEAVE. The horizontal dislocation of one lode by another.

HIGH EXPLOSIVES. Those of greater detonating force than black powder.

HORSE. A mass of country rock between the enclosing walls of a vein. To constitute a Horse, "It is necessary that the walls should converge about the mass below and at both ends, but the greatest known horses do not converge over head. The two walls coming to the surface are in some instances 1,000 feet apart." *Testimony of Clarence King in the Dives Case.*

HUDGE. An iron bucket for hoisting.

HUNGRY. Barren.

HYDRAULICS. That method of placer mining where the gravel is washed by a stream operating under hydraulic pressure.

I. D. B. Illicit Diamond Buyer. *Africa.*

IMPREGNATION. A metallic deposit having undetermined limits in no way sharply defined. *Von Cotta,* 87.

INCLINE DRIFT. A drift run at an incline to subserve the drainage. (2) A misnomer applied to a slope sunk upon a deposit having slight departure from the horizontal.

INFILTRATION THEORY. That which refers the origin of the ore to the deposit of mineral from water holding it in solution.

INJECTION THEORY. That which refers the origin of the ore to the introduction of igneous fluid.

IN PLACE. *In Situ.* Words used in Section 2329 of the U. S. Revised Statutes, qualifying the words "quartz or other rock," and to distinguish lode from placer claims. See p. 27.

INSTROKE. The right to work one mine through another mine. See p. 366.

IRON. A metallic element, silvery white in color when pure. Hard, tenacious, malleable and ductile. Hematite is its most usual ore and it is familiar as a constituent of white pyrites. The most valuable of all metals in its uses, but its ore is of commercial value only when containing a heavy percentage. Under fire and other treatment it becomes cast iron, wrought iron or steel. It is plastic to the presence of almost any foreign substance, phosphorus and sulphur tending to weaken, while alloys of vanadium, nickel, manganese and tungsten in slight percentages add almost incredible increase of strength and tenacity.

IRON HAT. (*Eisen Hut.*) The outcrop of a lode, it being usually colored by the decomposition of the iron. *Von Cotta,* 38.

JIG. A machine for concentrating ore by means of sieves. *Corn.*

JUMP. To take forcible possession of a claim. (2) To relocate abandoned property.

KIBBLE. A kind of hoisting bucket. *Corn.*

LAGGING. Poles or small timbers used for spanning from one stull-piece to another, for cribbing mill-holes and for lining behind the timbers of a shaft.

LEAD. An objectionable form of the word lode.

LEAD. A metallic element, bluish white. Galena and carbonates are its most common ores.

LEDGE. A term in use on the Pacific Slope synonymous with lode. See p. 196.

LENGTH. A certain portion of a vein when taken on a horizontal line on its course.

LEVEL. A drift along the vein; the word generally used where there are a series of drifts, as first level, second level, etc. See *Cambers v. Lowry*, 54 P. 816, 19 M. R. 539.

LIFT. The space between two levels.

LITTLE GIANT. A jointed iron pipe and nozzle decreasing in diameter with the increase of the hydraulic pressure; used in placer mining.

LOCATION. The successive acts by which a claim is appropriated. (2) The claim itself.

LODE. An aggregation of mineral matter containing ores in fissures. *Von Cotta*, 26. A vein of metallic ore. A ledge. *Corn.* See p. 196. (A fault in the country which has become mineralized. *A. H. Green.*)

MANGANESE. A hard, brittle metallic element; a common but (unless carrying 20 per cent or more) valueless constituent of many ores. Found as an oxide. Used in glass making, paints and chemicals.

MAN HOLE. An opening just large enough to permit access between two workings.

MATRIX. (Of the lode.) The country rock in which the vein is found. (Of the ore.) The rock or earthy material inclosing the ore; the vein-stone. *Latin.*

MATTE. One of the products of matte or pyritic smelting. It consists either of ferrous mono-sulphide (FeS), or of cuprous sulphide (Cu_2S), with ferrous mono-sulphide in varying proportion. *Franklin R. Carpenter, Ph. D.* See SMELTING.

MERCURY. Quicksilver. A shining silver-white metal, liquid at temperature above —40 deg. Fahr. Boils at 669 deg. Fahr.

METAL. An arbitrary designation of certain elements and alloys, usually hard, heavy, bright and sonorous, hence the phrase "metallic ring." No one distinction can exactly deliminate the metallic and non-metallic minerals. Gold, silver, copper, iron, tin, lead and mercury were the only metals certainly known to the ancients, all others, being more than three-fourths the total number of the elements, are medieval or modern discoveries. Two certain metals, although having no chemical affinity, are almost invariably found together. Native gold has always a percentage of silver; uranium with vanadium, cobalt with nickel, lead with zinc, are familiar instances. No theory has ever satisfactorily accounted for this association.

METALLURGY. The art of working metals, including smelting, refining, and parting them from the ores.

MICA. One of the constituents of granite. When separately crystallized is found in clear laminated plates.

MILL-HOLE. A passage left in the stope for throwing down rock or ore.

MILL-RUN. The returns of a lot of ore; the assay of ore in quantity as distinguished from a specimen assay.

MINE. Any excavation made for mineral. (2) An opened, as distinguished from an untouched deposit. (3) Underground as distinguished from superficial workings or quarries.

MINERAL. One of the three grand divisions of the natural world—animal, vegetable, mineral—*i. e.*, any non-organic substance. (2) In a legal sense, any inorganic product of the earth of greater commercial value than the soil itself. See p. 256.

MINER'S INCH. There is an attempted statutory definition in Colorado R. S. Sec. 7026 which is obscure and inexact. Orifices constructed as this statute directs will deliver through each square inch of opening a quantity which varies from 1.516 to 1.632 cubic feet of water per minute. The custom among engineers is to take 1.560 cubic feet of water per minute as the equivalent of an inch. Using this value for an inch, 38.4 inches is equal to a flow of one cubic foot per second. By section 3330 the State Engineer is required to use in all his records the cubic foot per second as "the unit of measurement of flowing water," and the cubic foot as the unit of measurement of volume. *Charles W. Comstock, State Engineer.*

MINER'S RIGHT. The license to locate, used in Australia.

MISPICKEL. A white pyritic ore of arsenic and iron.

MOLYBDENITE. A sulphide of the metal Molybdenum; found in scales with metallic lustre closely resembling tin foil or gray copper; also in a granular form, showing steel blue flake crystals. Valuable and marketable when concentrated, as an alloy for high grade steel. *A. B. Frenzel.*

MONAZITE. A valuable sand obtained by sluicing, carrying thorium oxide used in manufacture of incandescent gas mantles.

MOYLE. A drill or short bar sharpened to a point, used in cutting hitches and in broaching.

MUCKER. The man who fills the bucket or tram.

MUNDIC. Copper or iron pyrites. White Mundic is mispickel or arsenical pyrites.

NICKEL. A hard, malleable, ductile, white, magnetic metal. Used in coinage as an alloy with copper, for ornamental plating and to harden armor plate. Mined at Sudbury, Ontario, and in New Caledonia. Generally associated with cobalt, and both names are those of the guardian demons of superstitious miners.

NODULE. A small, rounded, stony concretion.

OCHRE. Any soft, earthy, metallic oxide. A decomposition formed into a clay-like substance which may, or may not, contain mineral value.

OPEN CUT. A longitudinal surface working not entering cover.

OPERATOR. One who works a mine either as owner or lessee.

ORE. The mechanical or chemical compounds of the metals with baser substances. The conventional divisions in the ore market are: DRY ORE: An ore which does not contain any lead, or less than 5 per cent. MILLING ORE: A dry ore that can be amalgamated or treated by leaching and other processes; usually these ores are low grades, free, or nearly so, from base metals. SHIPPING ORE: Such as is better adapted to smelting than any local treatment. Any ore of greater value when broken than the cost of freight and treatment. REFRACTORY ORE: An ore containing in quantities, arsenic, antimony or other base metals, which prevent economical treatment by usual and available processes. *W. J. Chamberlain.*

ORE IN SIGHT. Ore disclosed between drifts and shafts (or winzes) so that it can be measured, on the assumption that if exposed on four sides or three sides it presumably exists in the body of the stope the same as in the exposures. If exposed on two sides, it is counted as in sight to the extent of one-half the contents of the stope. Ore between drift, shaft and surface is ore in sight after allowance for depth of slide. Ore exposed on only one side is not ore in sight. *Kirby Thomas.*

ORE RESERVES. The ore body where exposed ready for stoping.

OUTCROP. That portion of a vein appearing at the surface.

OUTPUT. The gross product of a mine.

PAN. An iron basin used in gold prospecting.

PATCH. A small placer claim outside of the main gulch.

PATIO. A yard or court. The space where ore is mixed and amalgamated by tread of horses. *Sp.*

PATIO PROCESS. The Mexican method of amalgamation of silver ores.

PAY ROCK. The lode material in which the mineral or pay is found. See QUARTZ.

PAY STREAK. The ore body proper, or the seam of decomposed material which takes its place and preserves the continuity of the ore body.

PEGMATITE. A special form of granite. "Pegmatites are essentially coarse grained silicious dikes, not involving great amounts of mineralizers at the outset, but along their sides have afterwards circulated vapors which have contributed to the production of coarse crystallization. Finally highly heated silicious waters have brought in quartz and at a last stage various rare elements have been introduced." *J. B. Hastings, Mining Industry*, 1908, p. 876.

PENT HOUSE. A shed or horizontal barricade across one end of a shaft, made of strong timbers loaded with rock to protect against any accidental fall from above. *Corn.*

PERTENENCIA. The Mexican equivalent of a location or claim. Size, 100 metres square, about 328 feet.

PETROLEUM. Rock oil, medicinally used at an early date under the name of Seneca oil. In commercial usage of today the word "oil" has generally superseded "petroleum." In color, some shade of brown or green. Its chemical elements: Hydrogen and carbon. By geologists

considered a decomposition of organic matter, but this theory not absolutely proven. Its main sources: United States, Canada, Mexico, Baku (Russia), Bukowina (Hungary), Burmah. Its products: Gasoline, naphtha, lubricating oil, paraffin, and innumerable by-products. Found by drilling at depths as great as 5000 feet. The oil industry has introduced many new terms or given a new and technical meaning to words in common use, to-wit: PARAFFIN: A wax by-product of crude oil. It is the base of all high grade oil that is capable of being refined. ASPHALTUM BASE: Oil having an asphalt base, of low gravity and not capable of being refined. Used chiefly for fuel oil. ROTARY DRILLING: A form of drilling required in certain ground where the hole will not "stand up," and necessitates forcing a pipe downward with a circular motion. CABLE DRILLING: The customary method used in drilling in shale and rock soils in which the tools are suspended with a wire or Manila cable and alternately rise and fall. CREW: Consists of a driller and a tool dresser. TOWER: A day's work of a drilling crew. A tower runs from 12 noon until 12 midnight; and from midnight until noon. SPUDDING IN: The actual commencement of drilling after the rig is completed. The first abrasion of the soil made by the drill. This is considered the actual commencement of drilling operations. ROYALTY INTEREST: A percentage of the gross output of oil paid to the owner of the land free of cost. Any other form of interest requires participation in expenses. OFF-SET WELL: Where a well has been drilled on an adjoining property close to the line, it is generally required, either by law or by the contract, to drill a well within what are called the protecting lines, thus off-setting the producing well. FLOWING WELL: A well which flows naturally. PUMPING WELL: A well which accumulates a certain amount of oil per day, which it is necessary to bring to the surface by pumping. VACUUM PUMP: A form of pumping that produces a vacuum in the well, thus sucking in oil from adjoining territory. This form of pumping is forbidden in some fields. SHOOTING A WELL: Filling the hole through the oil sand with a high explosive (generally nitro-glycerin) which when exploded increases the collection area. NATURAL PRODUCTION: The production from a well which has not been shot. FLUSH PRODUCTION: The first production of oil per day from a well. (This may be either with or without shooting.) SETTLED PRODUCTION: The amount of production of oil per day after the first agitation has ceased and the well has reached an ordinary average producing basis. OIL SAND: A porous rock formation in which oil accumulates. GAS CLAUSE: A provision for an annual rental to be paid to the lessor for the sale of gas from a well. CASING: An outer pipe inserted in oil wells to prevent the caving of the sides and to shut out water. This remains the property of the lessee and is removed upon the abandonment of the well. CLEANING OUT: A process required to remove cavings, floating sand and all accumulations in order to increase the production. CASING HEAD GAS: Gas from a producing oil

well which is collected at the casing head and saved separately from the oil, and usually carries a large percentage of gasoline, which may be saved by compression. PLUGGING: The insertion of a heavy plug in and above the oil sand and filling in, to prevent water from flooding the oil sand. Often required by law in wells that are failures. *G. L. Warson, Denver.*

PHONOLITE. A volcanic rock of porphyritic texture; the crystals in some cases so minute as to be imperceptible unless magnified; thin slabs ring when struck, whence the name, literally, sounding stone.

PINCH. A narrow space where the walls come close together.

PIT. A shallow shaft. In Cornwall the working shaft or the whole mine is called the PIT.

PITCH. The dip of a lode.

PLACER. A deposit of gold not in place. Applied to all classes of gold deposit including cement and channel claims, except lodes in place. For special meaning under Sec. 2329 U. S. Rev. St. see p. 258. Gold, platinum, tin, gems and monazite are the minerals won by placer washing.

PLAT. A small chamber on the side or sole of a level where it intersects a shaft, made to facilitate dumping. Where it is cut in the sole it is called a trip-plat. *Corn.*

PLATINUM. A rare metal of steel gray color, very infusible, used in the arts. More valuable than gold. Always associated with iridium and osmium. Mined in the Ural Mountains. To be looked for in the black sand of placers.

POCKET. A detached ore body; a nest of ore.

POCKETY. A term applied to the mine where the pay ore occurs in small detached bodies with intervals of poor ore or barren material. The word implies a slur on the mine. *Paull v. Halferty,* 9 M. R. 149; 63 Pa. 46.

PORPHYRITIC GRANITE. A base of granite containing prominent crystals of feldspar.

PORPHYRY. A general term including such plutonic rocks as exhibit well formed crystals, usually of feldspar, in a finely granular or compact base of the same. *Gr.*

PROSPECTING. A search for deposits; applied both to the seeking for undiscovered veins and to the investigation of the value of known veins by exploration.

PYRITES. (White.) A bi-sulphide of iron. (Yellow.) A sulphide of copper. Bright crystallized metallic looking and very common gold bearing ores usually low grade and spoken of in common parlance as the "iron." *Gr.*

PYRRHOTITE. The mono-sulphide (Fe_7S_8) of iron. Almost always nickel bearing. The principal ore at Sudbury. *Dr. Carpenter.*

QUARRY. Any open work in rock on a plan of excavating the entire

mass, as distinguished from working a seam or vein by shafts or approaches under cover.

QUARTZ. *Silica.* A constituent of granite. The free gold of California being found in quartz, the word was applied to the gangue of such lodes and so to other forms of vein matter; until it is now used vaguely to mean the ore, the float, the gangue, or that part of the gangue which indicates the pay streak. In the Acts of Congress it is used with the word rock (quartz or other rock) in the sense of pay rock.

QUARTZITE. A metamorphosed sandstone; a rock containing usually about 98 per cent silica with a small percentage of foreign materials, principally iron.

QUICKSILVER. See MERCURY.

RADIUM. A metallic element discovered in 1898 by elimination from ores of uranium. It seems to possess the photographic powers of the X-Ray, has a unique spectrum, is a powerful but dangerous therapeutic, burns paper, decomposes water and has a dynamic force beyond any other known element. The world's production amounts to but a few ounces and its money value is greater than the price of diamonds.

RAISE. A shaft or winze which has been worked from below.

RAND. Range of hills. *Dutch.*

REEF. An Australian term for lode or ledge.

REGULUS. The alchemic term for "matte."

RHYOLITE. A name common to igneous rocks of a wavy texture indicative of movement or flowing when in a fluid state.

RIFFLE BLOCKS. Cross sections of timber set on the floor of a sluice with irregular spaces between, in which the gold settles. *American.*

ROB. To gut a mine; to work for the ore in sight without regard to supports, reserves or any future considerations.

ROCKER. See CRADLE.

ROOF. A stratum or rock overlying a deposit, or flat vein. The top or back of any working.

ROYALTY. The dues to the lessor.

RUSTY. Oxidized. Ore coated with oxide. Applies to gold which will not easily amalgamate.

SCALE. A loosened fragment of rock threatening to break off and fall.

SCHIST. Crystalline or metamorphic rock with slaty structure; usually carrying mica, sometimes argillaceous.

SEGREGATIONS. All those aggregations of ore having irregular form but definite limits. They differ from beds and lodes by the irregularity of their form; from impregnations by their definite limits. *Von Cotta 81.*

SELVAGE. A lining; a gouge; a thin band of clay often found in the vein, upon the wall.

SET. Portion of ground taken by a tributer.

SHAFT. A pit sunk from the surface; an opening more or less perpendicular sunk on, or sunk to reach, the vein.

SHIFT. (1) A miner's turn or spell of work. *Webster.* Two shifts is the equivalent of 16 to 20 hours work, three shifts, 24 hours work, of one man. (2) All the miners who go on and off at the same hours are known as one shift. In large mines there are usually three, styled the day, night and graveyard shifts. *Benj. C. Catren, Jr.*

SILICA. In chemistry it means Silicon dioxide. Formula, SiO_2. It is ordinary quartz. Between ore buyers and sellers everything not soluble in nitric and hydrochloric acids is counted as "silica"—a determination often manifestly unjust to the seller. *Franklin R. Carpenter, Ph. D.*

SILVER. A metallic element; the whitest of the metals. One oz. pure silver coined in U. S. dollars is worth $1.2929 gold.

SILVER GLANCE. An ore; when pure contains 87 per cent silver and 13 per cent sulphur.

SKIP. A square hoisting bucket running on guides, or in grooves.

SLATE. A sedimentary clay, hardened into rock, which splits readily into plates. Where lamination is not clear it is termed shale. Slate of commercial value is rare and is quarried principally in Wales, Vermont and Pennsylvania.

SLICKENSIDES. Smooth, polished portions of the wall or of some vertical plane in the lode, caused by friction. It may occur on the ore itself. *German.*

SLIDE. (1) One kind of fault—the vertical dislocation of a lode. (2) The mass of loose rock overlying either lode or country.

SLOPE. An opening driven upon the inclination of the vein.

SLUICE. A series of boxes set in line and floored with riffle blocks to catch the gold in a placer mine.

SMELTING. The reduction of metals from their ores in furnaces. It is a form of the word *melt.* In smelting the ore is melted. In other processes it is roasted. MATTE SMELTING. A process of smelting where the values in the ores are collected in an iron and copper sulphide *(regulus)* technically called "matte." When iron and copper pyrites are added to the charge for their fuel value as well as their matte-forming properties, the process is called "pyritic smelting." *Franklin R. Carpenter, Ph. D.*

SOLE. The floor of a horizontal working.

SOLLAR. Any platform or wooden floor or covering in a working. *Corn.*

SOUGH. A drain. *Eng.*

SPAR. A general term applied to rock with distinct cleavage and lustre. Iceland spar, a definite mineral having double refraction, has become rare, and is used for optical purposes.

SPELTER. Commercial zinc.

SPILING. Timbering used in quicksand or loose ground where laths are driven behind timbers and kept flush with the heading.

SPRAG. A temporary timber used to hold ground until permanent supports can be placed to hold working platform. A light stull.

SPUR. A branch or off-shoot from a larger vein.

STAMPS. Machine for crushing ores by vertical stroke.

STANNARY. A tin mine. From the Latin, *Stannum.*

STOPE. The working above or below a level where the mass of the ore body is broken. *Corn.*

STOPING. The act of breaking the ore above or below a level; when done from the back of the drift it is called overhand or back stoping; when from the sole it is underhand stoping.

STRATUM. A bed of rock or earth of any kind. *Dana.* The plural is *strata.*

STRIKE. The extension of a lode or deposit on a horizontal line. *Von Cotta 19.* Synonymous with TREND and COURSE.

STULLS. Cross timbers at the foot of a stope. Any extra heavy timbers.

SUBLIMATION THEORY. That which refers the filling of fissures to material deposited from ascending steam, or by condensation from a gaseous condition.

SULPHATE. The combination of a metal with both sulphur and oxygen.

SULPHIDE. The chemical union of sulphur with a metal.

SULPHUR. A non-metallic element. Yellow, fusible, brittle, insoluble; except Oxygen, the most common base combining element in metallic ores, such as Pyrites. As a commercial product most commonly mined from old volcanic craters. Greatest production, Sicily. Largest deposits in United States, Louisiana; Black Rock, Utah; Sun Light Basin, Big Horn County, Wyo. *T. S. Todd, Importer, 25 Broad Street, N. Y.*

SULPHURET. A sulphide. Sulphide is the more recent and approved term.

SUMP. The extension of a shaft, forming a pit for the collection of water. *Corn.*

SYLVANITE. A gold-silver-tellurium combination. Pure steel gray to silver white, inclining to pale yellow. Gold 24.5; silver 13.4; tellurium 62.1. Usually in fine grains or crystals. *A. B. Frenzel.*

SYNDICATE. An association or council of persons; in use since the Civil War to designate any combination formed to carry out a large financial enterprise.

TACKLE. The windlass, rope and bucket. *Corn.*

TAILINGS. The refuse discharged from the tail end of a sluice, or washed from any sort of placer working. The waste rock left after any process of ore separation.

TELLURIUM. A silver white, brittle substance, combining with many metals to form tellurides in the same manner as sulphur forms sulphides.

TIN. A soft, malleable, white metal. Mined in Cornwall since prehistoric times. Used commercially as a coating to thin sheets of iron, and as a factor in many alloys.

TRAM. The carriage of ores on rails or guides. The word is derived

from the name of James Outram, who first laid iron rails in a colliery in 1776.

TREND. The longitudinal course or strike of a lode.

TRIBUTERS. Miners who work a *set*, or piece of ground, taking the proceeds as wages, after royalty deducted, but who work under direction of the owners and hold no possession or title as lessees.

TROUBLE. A fault.

TUNDRA. The moss, or scrub-covered, regions of the Arctic.

TUNGSTEN. (Wolfram.) A hard, heavy, grayish white metal, that fuses with great difficulty. A steel hardening alloy. Its ores are Scheelite, Huebnerite and Wolframite, all of heavy specific gravity. Wolframite is similar to iron in appearance, but when scratched shows reddish brown. Huebnerite shows reddish brown, straight and fan-shaped crystals. Matrix of both, usually white quartz or buff-colored quartzite. *A. B. Frenzel.*

TUNNEL. A horizontal excavation starting at the surface and driven across the country for discovery or working purposes.

TUT WORK. Work paid for by the foot as distinguished from tribute work.

UPCAST. A ventilating shaft where the air ascends.

URANIUM. This metal occurs in the mineral uraninite or pitch blende as an oxide; also, associated with vanadium in the mineral carnotite. The color of pitch blende varies from gray to black; that of the carnotite is lemon yellow. Radium occurs in these ores and may be prepared from them. *Wm. P. Headden.*

VANADIUM. This metal occurs widely distributed, but is rarely met with in large quantities. The largest known deposit occurs near Placerville on the San Miguel River in Colorado, in a sandstone to which it gives a green color. Vanadium alloys with iron, forming ferro-vanadium, used in making certain high grade steels. It is best known in commerce as vanadic acid. V_2O_5. *A. B. Frenzel, Denver.*

VEINS. Aggregations of mineral matter in fissures of rocks. *Von Cotta 26; Bainbridge 2.* The word vein has a broader scope than lode, including non-metallic beds. See p. 196. It is also applied in working, to smaller seams threading the greater deposit. See VENA and VETA.

VENA. A small vein or the branches of the Veta, or main vein. *Span.*

VETA. A main vein. VETA MADRE. The mother vein. *Span.*

VUG. A cavity in the ore or rock.

WALL. The plane of the country where it touches the side of the vein, when used in reference to lodes. The side of a level or drift, when used with reference to the workings. See page 226.

WHEAL. A pit or hole in the ground. A mine. The names of most mines in Cornwall are preceded by the word *Wheal.* Old form *Huel. Corn.*

WHIM. A machine for raising the bucket by means of a revolving drum.

WHIP. An apparatus for raising the bucket with rope and pulleys, by horse power on a straight drive.

WINZE. A shaft sunk from a level; not necessarily connecting two levels.

ZINK. A metallic element; bluish white; generally found as a sulphide (blende) or as a carbonate (calamine).

TABLE OF SYMBOLS, ATOMIC WEIGHTS, SPECIFIC GRAVITIES AND FUSING POINTS

Element or Compound.	Chemical Symbol.	Atomic Weight.	Specific Gravity.	Fusing Pt. (Fahr.)
Aluminum	Al	27.1	2.60	1217.7°
Antimony	Sb	120.2	6.71	1166
Arsenic	As	74.96	(crystals) 5.73	1562
Bismuth	Bi	208.0	9.82	520
Cobalt	Co	58.97	8.50 to 8.80	2696
Copper	Cu	63.57	(cast) 8.80 (wire) 8.94	1981.5
Gold	Au	197.2	19.25	1945.5
Iron	Fe	55.84	7.86	2786
Lead	Pb	207.2	11.37	621.3
Manganese	Mn	54.93	7.50	2300
Mercury	Hg	200.6	13.59	Freezes at —38.0 below zero
Molybdenum	Mo	96.0	8.60	4500
Nickel	Ni	58.68	8.80	2646
Platinum	Pt	195.2	21.2 to 21.7	3191
Radium	Ra	226.0	....	1292
Silver	Ag	107.88	(deposited) 10.53 (cast) 10.75	1761
Silica	SiO_2	60.3	2.60	*
Sulphur	S	32.06	2.07**	235**
Tellurium	Te	127.5	6.25	846
Thorium	Th	232.4	(about) 11.0	over 3090 less than Pt.
Titanium	Ti	48.1	5.30	3272
Tin	Sn	118.7	(cast) 7.29	449.4
Tungsten	W	184.0	19.10	5430
Uranium	U	238.2	18.7	less than 3362
Vanadium	V	51.0	5.50	3128
Zinc	Zn	65.37	7.15	786.9

*Silica begins to soften about 2200° F. and can be thoroughly liquefied in an electric furnace.

**Sulphur occurs in two other forms which have 1.96 and 1.92 specific gravities and 246.5° F. and 224.2° melting points.

Compiled by ARTHUR HOWE CARPENTER, A. M., 210 Noble Avenue, Crafton, Pa.

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